35

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 105.

CHARLES F. GALE, AS RECEIVER OF THE ELMIRA NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE CHASE NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

(18,177.)

(18,177.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901.

No. 331.

CHARLES F. GALE, AS RECEIVER OF THE ELMIRA NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE CHASE NATIONAL BANK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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United States Circuit Court of Appeals for the Second Circuit.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff in Error,
vs.
THE CHASE NATIONAL BANK, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

[Stamped:] United States circuit court of appeals, second circuit. Filed Feb. 28, 1901. William Parkin, clerk.

United States of America, ss.: 1

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between CHARLES F. GALE, as Receiver of the 2
Elmira National Bank, plaintiff, and the CHASE NATIONAL BANK, defendant, a manifest error hath happened, to the great damage of the said Charles F. Gale as Receiver of the Elmira National Bank, plaintiff, as is said and appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the 3
United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 18th day of February, 1901, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Sec-

ond Circuit may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 1st day of February, in the year of our Lord one thousand nine hundred and one, and of the independence of the United States the one hundred and twenty-fifth.

JOHN A. SHIELDS,
Clerk of the Circuit Court of the
[L. S.] United States of America for
the Southern District of New
York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. C. J.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to 136, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Charles F. Gale, as Receiver of the Elmira National Bank, plaintiff in error, against Chase National Bank, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this eighteenth day of February, in the year of our Lord one thousand nine

hundred and one, and of the independence of the United States the one hundred and twenty-fifth. 7

JOHN A. SHIELDS,
Clerk.

[SEAL.]
(Stamp.)

(Endorsed)—The U. S. Circuit Court of Appeals for the Second Circuit.—Charles F. Gale as Receiver of the Elmira National Bank, Plaintiff in Error, *vs.* The Chase National Bank, Defendant in Error.—Writ of Error.—Goodrich, Whitney & Hagen, Attorneys for Plaintiff in Error, 59 Wall Street, New York City.—Service of a copy of the within Writ of Error is hereby admitted this fourth day of Feb., 1901, and citation is hereby waived. Reed, Simpson, Thacher & Barnum, Attorneys for Defendant in Error.— 8
U. S. Circuit Court.—Filed Feb. 4, 1901.—John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank,

AGAINST

CHASE NATIONAL BANK. 9

TO THE ABOVE NAMED DEFENDANT:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against

10 you by default for the relief demanded in the complaint.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 12th day of July, in the year one thousand nine hundred eight.

JOHN A. SHIELDS,
[L. S.] Clerk.

GOODRICH, WHITNEY & HAGEN,
Plaintiff's Attorneys.
Office and Post Office address,
59 Wall St.,
Borough of Manhattan,
11 New York City.

(Endorsed)—United States Circuit Court, Southern District of New York.—Charles F. Gale, as Receiver of the Elmira National Bank *vs.* Chase National Bank.—Summons.--Goodrich, Whitney & Hagen, Plaintiff's Attorneys.—The plaintiff directs service of process on the deft.'s Attys. Simpson, Thatcher & Barnum, of 10 Wall St,, N. Y.—Goodrich, Whitney & Hagan, Plff.'s Attys.

I hereby certify that on the 12th day of July, 1898, at the City of New York, in my district, I personally served the within summons upon the within named Chase National Bank by exhibiting to Simpson, Thatcher & Barnum, Attorneys
12 for said Chase National Bank, the within original. and at the same time leaving with them a copy thereof, as per directions hereon of Plaintiff's Attorneys, Goodrich, Whitney & Hagen. William Henkel, U. S. Marshal, S. D. N. Y. Dated New York, July 12, 1898.--U. S. Circuit Court.—Filed Jul. 12, 1898.—John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES, 13

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff,

AGAINST

CHASE NATIONAL BANK,
Defendant.

} Complaint.

14

The plaintiff above named complains of the defendant above named, as follows (the allegations of paragraphs 5, 6, 7, 8, 9 and 10 being made upon information and belief):

I.—The plaintiff above named is a citizen and resident of the Northern District of New York, in the State of New York. The defendant is and at all the times hereinafter mentioned has been a national banking association, organized and incorporated under the Revised Statutes of the United States, and carrying on the business of banking in the Southern District of New York. 15

II.—The Elmira National Bank above named was a national banking association organized and incorporated under the Revised Statutes of the United States, and carrying on the banking business at the City of Elmira, in the Northern District of New York, at the times hereinafter mentioned and down to May 23, 1893, when it closed its doors and then and there suspended and discontinued its business and has not since resumed the same.

16 III.—On May 26, 1893, the Comptroller of the Currency of the United States having become satisfied of the insolvency of the said bank did, under the authority of the Revised Statutes of the United States, appoint one Charles Davis, Receiver of said Elmira National Bank, by certificate under his hand and official seal, dated on that day; and said Receiver duly qualified according to law and entered upon the duties of his trust and continued in the discharge of the same until his death on April 14, 1896.

IV.—On May 21, 1896, the Comptroller of the Currency of the United States did, under the authority
17 of the Revised Statutes of the United States, appoint this plaintiff Receiver of said Elmira National Bank, by certificate under his hand and official seal, dated on said day, and this plaintiff thereupon duly qualified according to law and entered upon the duties of his trust and has since continued in the discharge of the same.

V.—Prior to its suspension, as aforesaid, the Elmira National Bank had a bank account with this defendant, depositing large amounts of currency, checks and other negotiable paper with the defendant and drawing against the same. It was agreed between said banks that interest should be allowed
18 upon the balance of this account from day to day in whose favor soever the daily balance should be, at the rate of 6 per cent. per annum.

VI.—On May 5, 1893, one J. J. Bush was the cashier of the Elmira National Bank.

I.—On or about February 14, 1891, said Bush had given to defendant his promissory note in writing, payable to defendant on demand, for the sum of $25,000; and on said May 5, 1893, he was still indebted thereon to the defendant in the sum of $15,000 principal and $12.50 interest.

VIII.—On said May 5, 1893, the account of said Bush in Elmira National Bank was overdrawn, and he was indebted to said bank by reason of such overdraft, and was without authority to accept or certify any check on said bank in his own favor.

IX.—On said May 5, 1893, at the office of defendant in the City of New York, said Bush signed a check in the following words, to wit.:

"New York, May 5, 1893.

"Elmira National Bank, Elmira, N. Y.
"Pay to the order of the Chase National
"Bank Fifteen thousand twelve and $\frac{50}{100}$ dol-
"lars, $15,012.50.
"To.....

"(Signed) J. J. Bush."

He thereupon also at said office signed the following statement written across the face of said check, to wit.:

"Certified and accepted, May 5, 1893,
"Payable at Chase National Bank, New York.
"Elmira National Bank, by J. J. Bush,
"Cashier."

He thereupon also at said office delivered said check to the defendant by one W. H. Porter, its vice-president. All the words quoted aforesaid had been written by said Porter except the signatures "J. J. Bush" and "J. J. Bush, Cashier"; and the making and delivery of said check had been suggested by said Porter on behalf of defendant as a means of liquidating Bush's said indebtedness. Forthwith after the delivery of said check the amount thereof was charged by defendant to the account of the Elmira National Bank, and said amount was thereupon and thereafter retained by defendant to its own use out of the moneys of said Elmira National Bank in its possession; and the interest payments by the Elmira National Bank to defendant were thereby from said day increased at the rate of six per centum per annum upon the sum of

22 $15,012.50. No notification of the transaction was given by defendant to the Elmira National Bank, and it remained unknown to said bank and its officers and directors, except said Bush, until after the appointment of the first Receiver as aforesaid. No consideration for said $15,012.50 was received by said Elmira National Bank, but said amount was credited by defendant to said Bush as a payment of his said individual indebtedness.

X.—The return of said amount was duly demanded of the defendant by said Davis as Receiver of the Elmira National Bank, on or about July 28, 1893, but no part thereof or of the interest accruing
23 thereon since May 5, 1893, has been paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of $15,012.50, with interest thereon from May 5, 1893.

GOODRICH, WHITNEY & HAGEN,
Plaintiff's Attorneys.

NORTHERN DISTRICT OF NEW YORK, } ss.:
County of Broome, }

CHARLES F. GALE, being duly sworn, says: I am the plaintiff in the above entitled action. The foregoing complaint is true of my own knowledge, except as to the matters stated therein upon information and belief, and as to those matters I believe it
24 to be true.

(Sgd.) CHAS. F. GALE.

Sworn to before me this }
9th day of July, 1898. }
(Sd.) GEORGE W. OSTRANDER,
[NOTARY'S SEAL.] Notary Public.

(Endorsed)—Circuit Court of the U. S., Southern District of New York.—Charles F. Gale, Receiver, Plaintiff, against Chase National Bank, Defendant.—Complaint.—Goodrich, Whitney & Hagen, Plaintiff's Attorneys, 59 Wall Street, New York City.—U. S. Circuit Court.—Filed Jul. 12, 1898.—John A. Shields, Clerk.

At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the thirty-first day of October, 1899. 25

Present—Hon. WILLIAM K. TOWNSEND,
District Judge.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff, 26

AGAINST

THE CHASE NATIONAL BANK, Defendant.

Order Amending Complaint.

The above entitled action having come on to be tried upon the issues raised by the complaint and answer, and a motion having been made by the plaintiff before the introduction of any evidence upon the trial to amend the complaint by inserting at the end of paragraph IX. thereof the following 27 words, viz.:

"At the time of the appointment of the first Receiver as aforesaid there remained in the hands of the defendant of the moneys deposited by the Elmira National Bank, a large balance undrawn in addition to said $15,012.50 and interest thereon. Said additional balance was paid to said Receiver, leaving said $15,012.50 and interest still due, payment whereof was refused by the defendant upon demand therefor by said Receiver, and which remains wholly unpaid."

28 Now, on motion of Goodrich, Whitney & Hagen, attorneys for plaintiff, and after hearing Austen G. Fox, of counsel for defendant in opposition thereto, it is

Ordered, that the said amendment be, and the same hereby is allowed, and that the allegations thus inserted in the complaint be deemed to be controverted by the defendant, without prejudice to defendant's objection to the allowance of said amendment, and that this order be made a part of the record of this cause.

Enter November 16, 1899, as of October 31, 1899.

W. K. TOWNSEND,
Judge.

29

(Endorsed)—United States Circuit Court, Southern District of New York.—Charles F. Gale as Receiver of the Elmira National Bank, Plaintiff, against the Chase National Bank, Defendant.—Order.—Goodrich Whitney, & Hagen, Plaintiff's Attorneys, 59 Wall St., New York City.—A copy of the within this day received. November 4, 1899.—Reed, Simpson, Thacher & Barnum, Attorneys for Defendant.—U. S. Circuit Court.—Filed Nov. 16, 1899.—John A. Shields, Clerk.

30

CIRCUIT COURT OF THE UNITED STATES, 31

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

vs.

CHASE NATIONAL BANK, Defendant.

Answer.

32

Defendant answers the complaint herein as follows:

1. It denies any knowledge or information sufficient to form a belief as to the truth of any of the following allegations of said complaint: The allegations of plaintiff's citizenship and residence, in paragraph "I."; all the allegations of paragraphs "III.," "IV." and "VI."; the allegations of Bush's overdraft and indebtedness, in paragraph "VIII."; the allegation in paragraph "IX.," that "it remained unknown to said bank and its officers and directors except said Bush, until after the appointment of the first Receiver as aforesaid," and that "no consideration for said $15,012.50 was received by said Elmira National Bank"; and the allegations of demand by Davis, in paragraph "X." 33

2. It denies, on information and belief, the allegation as to Bush's authority, in paragraph "VIII." of said complaint, and in respect to the allegations of paragraph "IX." thereof denies that "the making and delivery of said check had been suggested by said Porter on behalf of de-

fendant as a means of liquidating Bush's said indebtedness," except in connection with a tender then made by Bush, in payment of his indebtedness of currency, and a draft aggregating said amount and apparently belonging to him, and denies that forthwith after the delivery of said check, the amount thereof was charged by the defendant to the account of the Elmira National Bank," except as an offset to the credit thereupon written in said account of the aforesaid currency and draft which were not so credited as belonging to said Elmira National Bank, or received from it or for its account, but solely as against and to make good the charge aforesaid, said check, charge and credit, as one transaction, being employed to apply the said currency and draft to the payment of said indebtedness for which they were tendered; and denies every allegation of said paragraph "IX." after the one last above quoted not hereinbefore expressly controverted.

Wherefore, defendant asks judgment dismissing the complaint, with costs.

SIMPSON, THACHER & BARNUM,
Attorneys for Defendant.
Office and Post Office address,
10 Wall Street,
New York City.

SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of New York, }

WILLIAM H. PORTER, being duly sworn, says: I am the vice-president of the Chase National Bank, the defendant in the above entitled action; the foregoing answer is true to my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those mat-

ters I believe it to be true. This verification is not made by the defendant because it is a corporation. 37

WM. H. PORTER.

Sworn to before me this 9th day of September, 1898.

SAMUEL H. JARVIS, Jr.,
Notary Public,
New York County.

(Endorsed)— Circuit Court of the U. S., Southern District of New York.—Charles F. Gale, Receiver, *vs.* Chase National Bank.—Answer.—Simpson, Thacher & Barnum, Attorneys for Defendant, 10 Wall St., New York.—Service of a copy of the within answer is hereby admitted this 9th day of September, 1898. Goodrich, Whitney & Hagen, Attys. for Plff.—U. S. Circuit Court.—Filed Nov. 9, 1899.—John A. Shields, Clerk. 38

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CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff, 39

AGAINST

CHASE NATIONAL BANK,
Defendant.

The undersigned, Chase National Bank, the defendant herein, and Simpson, Thacher & Barnum, attorneys for said defendant, hereby consent to the substitution of Reed, Simpson, Thacher & Barnum

as attorneys for said defendant herein, in place of Simpson, Thacher & Barnum.

Dated October , 1899.

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK,
By A. B. HEPBURN,
Vice-President.
SIMPSON, THACHER & BARNUM,
Defendant's Attorneys.

(Endorsed)—U. S. Circuit Court, Southern District of New York.—Charles F. Gale, Receiver, *vs.* Chase National Bank.—Consent and Rule of Substitution.—Reed, Simpson, Thacher & Barnum, Attorneys for Deft., 10 Wall Street, New York.—U. S. Circuit Court.—Filed Oct. 10, 1899.—John A. Shields, Clerk.

13822

43 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 22d day of October, 1900.

Present—Hon. NATHANIEL SHIPMAN,
Circuit Judge.

44 CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff,

AGAINST

THE CHASE NATIONAL BANK,
Defendant.

The above entitled action having come on to be tried upon the issues raised by the complaint and answer, and a motion having been made by the defendant before the introduction of any evidence upon the trial, to amend the answer by inserting the following additional paragraph, to wit: 45

"The defendant further alleges upon information and belief, that before the commencment of this action, and in and by a final judgment on the merits in an action between Charles Davis, mentioned in the complaint herein, as Receiver of the Elmira National Bank, as plaintiff, and this defendant, as defendant, in the Supreme Court of the State of New York for the County of Chemung, it was adjudged and determined that the defendant did not wrongfully and illegally charge on its books the Elmira National Bank with the amount of the check $15,012.50 men-

46 tioned in the complaint herein, and that the defendant did not illegally, wrongfully or fraudulently use or apply the funds of the Elmira National Bank to the payment of said check, and did not retain the amount of said check to its own use out of moneys of the Elmira National Bank in its possession; that said Davis was the predecessor in office of the complainant herein as Receiver of the Elmira National Bank, and said judgment is final and conclusive upon it."

Now, on motion of Reed, Simpson, Thacher & Barnum, attorneys for defendant, and after hearing Edward B. Whitney, of counsel for plaintiff, in op-
47 position thereto, it is

Ordered, that the said amendment be, and the same hereby is, allowed and deemed to be made, and that this order be made a part of the record of this case.

Enter as of October 22, 1900.

N. SHIPMAN,
Circuit Judge.

(Endorsed)—U. S. Circuit Court, Southern District of N. Y.—Charles F. Gale, as Receiver of the Elmira National Bank, against The Chase National Bank.—Order Amending Answer.—Reed, Simpson, Thacher & Barnum, Attorneys for defendants, 10 Wall Street, New York.—U. S. Circuit Court.—Filed Jan. 26, 1900.—John A.
48 Shields, Clerk.

At a Stated Term of the Circuit Court 49
of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Monday, the 22d day of October, in the year of our Lord one thousand nine hundred.

Present—The Honorable NATHANIEL SHIPMAN,
Circuit Judge.

CHARLES F. GALE, as Receiver of the Elmira National Bank, 50

vs.

CHASE NATIONAL BANK.

Now comes the plaintiff, by Edward C. Whitney, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant, by Austen G. Fox, Esq., its attorney. Thereupon a jury is impanelled and the cause proceeds to trial. After hearing the evidence for the respective parties, the argument of counsel and the charge of the Court, the jury, on 51
Friday October 26, 1900, retire in charge of an officer duly qualified to attend them, and upon their return say they find a verdict for the plaintiff for $12.50, with interest at 6 per cent. from May 5, 1893. Stay of 60 days to prepare a bill of exceptions.

(An extract from the Minutes.)

JOHN A. SHIELDS,
Clerk.

[SEAL.]

52 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

AGAINST

THE CHASE NATIONAL BANK, Defendant.

53 The issues in this cause having on the 22nd day of October, 1900, come on to be tried before the Honorable Nathaniel Shipman, United States Circuit Judge, and a jury, and the jury having on the 26th day of October, 1900, rendered a verdict in favor of the plaintiff and against the defendant for the sum of twelve dollars and fifty cents, with interest at six per cent. from May 5th, 1893, it is hereby ordered and adjudged, that the plaintiff, Charles F. Gale, as Receiver of the Elmira National Bank, recover from the defendant, the Chase National Bank, the sum of twelve dollars and fifty cents, and the further sum of five dollars and sixty cents interest, amounting in all to the sum of
54 eighteen and $\frac{10}{100}$ dollars ($18.10) and that plaintiff have execution therefor.

Judgment signed and entered this 29th day of January, 1901, at 3.30 o'clock, P. M.

JOHN A. SHIELDS,
Clerk.

(Endorsed)—United States Circuit Court, Southern District of New York. — Charles F. Gale, as Receiver of the Elmira National Bank, Plaintiff, against Chase National Bank, Defendant. — Judgment — Goodrich, Whitney & Hagen, Attys. for Plaintiff, 59 Wall St., New York City.—U. S. Circuit Court.—Filed Jan. 29, 1901.—John A. Shields, Clerk.

United States Circuit Court,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

AGAINST

THE CHASE NATIONAL BANK, Defendant.

Bill of Exceptions.

Be it remembered, that at a Stated Term of this Court, held at the United States Court rooms in the Post Office Building, in the Borough of Manhattan, City of New York, on Monday, October 22, 1900, before the Honorable Nathaniel Shipman, Circuit Judge, and a jury duly empanelled and sworn, the above entitled cause was duly tried, and that upon the trial of said cause the plaintiff duly took exceptions to rulings upon the admission of evidence and upon plaintiff's motions to direct a verdict, and to instructions by the Court to the jury, and to the refusal of the Court to grant instructions duly prayed by the plaintiff, as is hereinafter in this bill of exceptions duly set forth.

APPEARANCES:

EDWARD B. WHITNEY, of Counsel for Plaintiff.
AUSTEN G. FOX and ALFRED B. THACHER, of Counsel for Defendant.

The following contains all of the evidence and proceedings on the trial which are material to the consideration of plaintiff's exceptions.

It was admitted by both parties that Charles Davis was appointed Receiver, as alleged in the complaint; that he thereafter died; and that the present plaintiff was appointed Receiver in his stead, and has full capacity to maintain this action.

Plaintiff introduced in evidence a letter of W. H. Porter, Vice-President of the Chase National Bank, to Charles Davis, Receiver of the Elmira National Bank, dated June 6, 1893, enclosing the account current between said banks for the month of May, 1893.

Marked Exhibit A.

Plaintiff introduced in evidence said account.

Marked Exhibit B.

Said account is the Chase National Bank's statement of the account of the Elmira National Bank as a depositor in the Chase National Bank. It contains numerous items on both sides of the account, and among them the following:

As a charge against the Elmira National Bank on May 5, 1893, "Dft. $15,012.50"; as a credit to the Elmira National Bank on May 5, 1893, "Currency, $8,000"; as a credit to the Elmira National Bank on May 8, 1893, "Phila. ck., $7,000." Said account shows a final balance of $20,312.88 in favor of the Elmira National Bank.

Plaintiff introduced in evidence the $15,012.50 certified check, which is fully described in the complaint herein.

Marked Exhibit C.

Plaintiff introduced in evidence certain correspondence and pleadings which were held by the Court to be *prima facie* proof of a demand and refusal, as alleged in the complaint.

Marked Exhibits E to O inclusive.

Plaintiff conceded that the balance of $20,312.88 appearing on the account current (Exhibit B), had

been paid by the Chase National Bank to the Receiver of the Elmira National Bank about August, 1893. Plaintiff's counsel holding in his hand the check, said: "I tender to my friends the check for $15,012.50, inasmuch as we repudiated the transaction." Defendant's counsel made no response.

CHARLES F. GALE, the plaintiff, testified on his own behalf that he was the Receiver of the Elmira National Bank; that he had been assistant to the former Receiver, Mr. Davis; that the bank failed May 23, 1893; that he went there as clerk May 31, 1893, and was there when the account current Exhibit B was sent in by the Chase National Bank; that the $15,012.50 certified check Exhibit C was transmitted by the Chase National Bank to the Receiver with said account.

On cross-examination Mr. Gale testified that he first came officially into possession of any of the papers of the bank about June 2, 1893, as clerk for Mr. Davis as Receiver. He identified on said account Exhibit B, the three entries above referred to, and testified that he checked up the account as clerk for his predecessor, Mr. Davis; that the $7,000 and $8,000 entries would balance the $15,012.50 entry, with the exception of $12.50; that anybody would know this. It is a simple matter of figures.

[PLAINTIFF RESTS.]

WILLIAM H. PORTER, a witness for the defendant, testified as follows: I reside in the City of New York, and have been vice-president of the Chemical Bank since January 1, 1899. Before that I was vice-president of the Chase National Bank from November, 1892, and prior to that, was the cashier of the Chase Bank. I was connected with the Chase Bank about twelve years. I know J. J. Bush, who was formerly cashier of the Elmira National Bank, of Elmira,

New York. I knew him when he was cashier of that bank. My bank held in May, 1893, a certain note made by Mr. Bush. It had been for $25,000 originally. There had been two payments of $5,000 each made by Mr. Bush on that note theretofore.

On the afternoon of May 4, 1893, I rang up Mr. Bush on the telephone and referred to the financial conditions prevailing and referred to his personal note, which was secured by bank stock, and which had been originally taken as an exception to our general rule in the bank, which was that we did not lend on bank stock, and told him that bank stocks were no longer satisfactory to our directors as collateral; that by the terms of his note we could call upon him at any time to substitute other collateral. I asked him to substitute other collateral, or send us additional collateral. He replied that he would pay off that loan the next morning. He was in my office when I reached the bank the next morning. About nine o'clock.

Q. Can you give the substance of what took place between Mr. Bush and yourself at that time?

Mr. Whitney: That is objected to as incompetent. Anything that Mr. Bush said in the conversation with Mr. Porter, having come down for the purpose of paying off his loan individually, cannot bind the Elmira National Bank.

Objection overruled. Exception by plaintiff.

A. Yes, I can.

Q. Please give it?

A. Mr. Bush was in the president's private office in the bank when I arrived. He had a little satchel there with him on the table. He greeted me and referred to the telephone conversation of the previous day, and stated that he had come down to pay off the loan. He opened the satchel and took out of it a package of currency, $8,000, and a cashier's check or draft of the Elmira National

Bank, signed by him as cashier on the Quaker City National Bank.

It was for the purpose of paying off his note. I declined to take a check on Philadelphia as cash in payment of a note, which by its terms was payable in the City of New York. As a bank officer, Mr. Bush appreciated, as I did, the situation in Philadelphia, which was more acute on account of the panic than anywhere else in the United States, not excepting New York, and it was impossible to get money or returns for checks on Philadelphia. His bank had this money deposited in Philadelphia. He was anxious to use it, and to get his money out of Philadelphia, if possible, and he asked me if I could make a suggestion as to how this could be done. I told him that I did not know of any way unless, if he kept a personal account with the Elmira National Bank, which he said he did, he drew his personal check on the Elmira Bank for the amount of this loan, $15,000, and the interest which was due for four or five days, and accept that check as cashier of the bank, making it payable at the Chase National Bank at New York, which was New York funds, and would be available to pay a note payable in New York City, and to let that $15,000 be deposited to the credit of his bank, the Elmira Bank, the $8,000 of currency and the $7,000 check. He said that was acceptable to him. The check was drawn, the $15,000, and the five days' interest, $12.50, and signed by Mr. Bush, accepted and certified and made payable at the Chase National Bank, as we had arranged. I rang for the discount clerk, Mr. Voorhees, who brought in the note and collateral, and he stood there and he gave the $15,000 check to Mr. Voorhees, gave him the $8,000 in currency and the $7,000 check, and he took the papers all away and the $15,012.50 check was charged up. I instructed Mr. Voorhees to have the $15,012.50 check charged up to the Elmira Bank's account and to have that currency and the $7,000

check credited to their account, and Mr. Voorhees took the papers away with him. I did not follow him. Mr. Bush said he was going to Philadelphia from here and was in a great rush, and he asked if he could leave his collateral for a few days, and I told him he could. I instructed Mr. Voorhees to have the stock put away in a special deposit for safe keeping in the vault subject to Mr. Bush's order. I kept it at his request.

Q. (Showing witness the entry of "Dft. $15,012.50" on the account current, Exhibit B.) This is the original entry made by the Chase National Bank to the Elmira Bank?

A. The monthly account current.

Q. Will you point out on this monthly account current, Exhibit B, the entry of the two items to which you have referred, covering the $8,000 and the $7,000?

A. The statement shows on the 5th of May a credit of currency of $8,000.

That is the $8,000 to which I testified. On May 8, which was as soon as we could hear from Philadelphia by mail, it showed a credit of $7,000 against this Philadelphia check. Those are the two items which offset the debit of the draft, except the $12.50.

After Mr. Bush's note had been reduced to $15,000, he had paid interest on the loan of $15,000 from month to month. I don't recollect in what form interest payments were made. I was familiar with the system employed by the Chase National Bank in keeping its accounts. There was an account current between the Elmira Bank and the Chase Bank for several years prior to 1893. The payments of principal and interest on individual loans were kept in a book separate from the book which contained a statement of the account current.

The Quaker City $7,000 draft, above referred to, was introduced in evidence and marked Exhibit No. 1. It is as follows:

Exhibit No. 1.

" No. 13 PHILADELPHIA, May 4th, 1893.

" THE QUAKER CITY NATIONAL BANK

" Pay to the order of J. J. Bush Cashier.....

" Seven Thousand.....100 Dollars.

" $7,000. J. J. BUSH.

" Cashier."

Stamped across the face:

" Paid

" May 6, 1893

" The Quaker City Nat'l Bank,

" Philadelphia."

Endorsed:

1st:

" For deposit in

" Chase National Bank

" to credit of

" J. J. BUSH

" Cashier."

2d: (stamped)

" Pay First Nat. Bank,

" Philadelphia, Pa.

" or order for collection and

" remittance of proceeds to the

" Chase National Bank,

" 5 New York

" J. T. MILLS, Jr., Cashier."

J. J. Bush's individual promissory note for $25,000, dated February 14, 1891, payable on demand to the order of and at the Chase National Bank, was produced by the defendant from the papers in its possession, and was introduced in evidence and marked Exhibit No. 2.

The witness further testified as follows:

Mr. Bush never up to the time I severed my connection with the Chase National Bank called for the collateral to his note or demanded it. It remained as a special deposit subject to his order. The note was put away with the stock.

When Mr. Bush presented the Quaker City $7,000 draft (Ex. No. 1) to me it was drawn to the order of J. J. Bush. The word "Cashier," following the name of the payee, was not written there. After it had been decided to have this transaction passed through the account of the Elmira National Bank Mr. Bush endorsed his check "For deposit in the Chase National Bank to the credit of" and signed "J. J. Bush, Cashier," because he was the cashier of the bank; and, having done that, he noticed that it was drawn to his personal order and endorsed as cashier, and, instead of indorsing it personally above this cashier endorsement, he wrote the word "Cashier" on the face of the draft to make it correspond with the endorsement which he had already made. This was done in my presence as a part of the original transaction, as I recollect it.

Q. Now, at the time that Mr. Bush delivered you this check, or draft, on the Quaker City Bank to his own order individually, did you believe it was his own draft, that he could use in his own business?

A. I did.

Q. With regard to the $8,000 currency, did you believe that was his own money which he could use in payment of his debts?

A. I certainly did.

CROSS-EXAMINATION:

I am thirty-nine years old. The Chase National Bank had under me one paying teller, one receiving teller and a corps of 100 men, all told; it had a very large number of correspondents among the country banks. The drafts from the corresponding banks were not all examined by me personally. I have seen drafts on the Chase National Bank or other banks signed by Mr. Bush before this Quaker City draft, Exhibit No. 1. I cannot tell you just how long before, but I have seen a great many of them, because it was my custom to look over the different drafts drawn by our correspondents every day, and particularly large drafts. By large drafts I mean as to those drawn to other banks on New York, $5,000 and upwards; those drawn to ourselves, or remitted to us for account of third parties, I saw all of them, no matter what the size of them was. I had been acquainted with Mr. Bush for some time at that time. We never had any personal transactions with him, except this loan. I had known him for some time at that time. I have testified previously in this litigation. When I testified in Elmira in the case brought by Mr. Davis I was still vice-president of the Chase National Bank. I had only one interview with him on May 5, 1893. I should say that it was not more than fifteen minutes long. Those present were Mr. Bush and myself, and toward the end of the conversation Mr. Voorhees, who came in and attended to the details. He took my orders simply. That conversation took place in the president's office of the Chase Bank. It was brought about by a telephone conversation between Mr. Bush and myself the previous afternoon. I called him up at the Elmira Bank. We both had telephones. I called him up on the long distance phone. By the "financial conditions prevailing" to which I referred in my telephone conversation, I mean what we ordinarily call the panic of 1893. It was a panicky time. The reference to the time was especially

applicable to the character of his collateral. Bank stocks are not usually accepted as collateral by New York banks, but there are exceptions, and this was one of them. When I met him at the Chase National Bank I told him we could not take a check on Philadelphia in payment, or on account of payment, of a note payable in New York. I do not think I said the $8,000 currency could not be received. I did not take the $8,000 currency and credit it on the note, because we arranged this matter as we did for the purpose of simplifying the bookkeeping and to put it all through one transaction. My reasons for refusing the Philadelphia draft were not that the credit of the Philadelphia bank was not good. That was not the point. Our Philadelphia correspondents were several weeks in arrears at that time, and had not paid us the money on checks we had sent there to collect for several weeks. They had put them to our credit, but had not remitted for them, because it was impossible to buy New York funds in Philadelphia. You could not go into a Philadelphia bank and buy a draft on New York for any money. They were four weeks delinquent in remitting. I did not have the Quaker City Bank particularly in mind. I had no objection to the bank at all. I objected to any check on any Philadelphia bank. It would have been the same on any other bank. I was unwilling on May 5, 1893, to take a Philadelphia bank draft and credit it on my books, and allow him to draw against it if it was a large draft. In this case he was going to pay off a loan and the interest on it. I suggested this arrangement as the only way I knew whereby he could use this Philadelphia check. I called in Mr. Voorhees and instructed him to deposit the Philadelphia check for collection to the credit of the Elmira Bank. Collection, in banking parlance, means that an item is not credited until you get the money for it. It is customary to allow the depositor to draw against it. This was a case between two banks where interest was allowed on the balance.

A bank sometimes transfers from its funds in Philadelphia to New York by sending its New York correspondents its own draft on Philadelphia, knowing that the draft cannot be received for two or three days, or perhaps a week, in the regular course of mail, and if the New York bank was to put that Philadelphia check immediately to the credit of the country bank drawing it, it would be paying interest on a piece of paper that would be in transit for a few days to Philadelphia, or a week, and another one coming back here, for two or three days, and would be losing that interest. Therefore, it is the custom among the banks to allow instead the country banks to put in their personal check for collection and to credit the proceeds when they are received, in order not to lose interest, but it is also permissible for that country bank to draw against such drafts in the meantime if they desire.

I never communicated at any time with any of the other directors or officers of the Elmira Bank about Mr. Bush's authority in this transaction, either at the time or afterwards. I made no inquiry of Mr. Bush as to whether he owned the currency or whether it belonged to the Elmira Bank. I made no inquiry of him as to his authority to use this draft for his personal benefit.

He added the word "Cashier" on the $7,000 Quaker City draft in my presence. According to my recollection everything else was on the face of that draft at the time it was first shown me, just as it is now; it was a complete draft for $7,000, signed by J. J. Bush, Cashier, and to the order of J. J. Bush individually. Mr. Bush endorsed it right there, either at the table or over at the signature desk, I have forgotten which. At the same time he signed the $15,012.50 check and signed the acceptance of that check. It was all done at the same time. The addition of the word "Cashier" was made in my presence after the endorsement on the check. I was present and saw the addition made there. I don't know that the addition was at my suggestion. I don't remember

whether I suggested it or whether he noticed it and put it on. It was done. I received it, of course. According to the customs of banking a check payable to the order of J. J. Bush, Cashier (Mr. Bush being Cashier of the Elmira National Bank), is exactly equivalent, I should think, to a check payable to the order of the Elmira National Bank. If the check was credited, it would make it that way to correspond with the endorsement. As a check so deposited in my bank I suppose it was substantially a check to the order of the Elmira National Bank and endorsed by the Elmira National Bank. I do not know of anything on that check to apprise the Quaker City National Bank that the check or draft was drawn for the individual benefit of J. J. Bush. If the word "Cashier" had not been added on the face of it, I do not know whether the Quaker City National Bank would or would not have known that it was drawn for the individual interest of J. J. Bush.

When I testified at the trial of the action brought by Mr. Davis about this draft I recalled that there was a change made in it. I had not seen it for three years. The check was produced on the trial, and then it came right back to me what that change was, and I recalled that it was this particular change that was made.

Q. Does not the word "Cashier" opposite the name of the payee of that check appear to you to be in precisely the same ink and written at the same time that the signature "J. J. Bush, Cashier" to that check was written.

A. There is a similarity in the color of the word in the word "cashier," and I know it was written at the same time.

I could not say that it is distinctly a different ink from the ink in the endorsement on the back of the draft. I cannot say that You can use the same ink and blot one and not the other, and they look entirely different in making the two signatures.

Q. Mr. Porter, you say that you personally ex-

amined all of the checks or drafts that were drawn to the order of your bank by all persons?

A. Not exactly that. I looked over all large checks, about $5,000 and upwards, that passed through the bank, no matter whether they were drawn upon or deposited, and then I looked at the checks drawn upon us, it may be to the order of the Chase Bank, or to the order of other banks in the City, to keep run of the business. I look over the current deposits of checks made by our correspondents upon us that were deposited by our dealers as distinct from them. This $75 check was remitted direct to the bank to pay interest. That I would not naturally see. That was an indebtedness to our bank. If it was remitted by the Elmira Bank to the order of the Chase Bank to the credit of some bank in Albany, or elsewhere, then, though it may be less than $5,000, I should probably see it. I would not be apt to see a check payable to the Chase National Bank for an amount less than $200 when simply to pay an item of interest to the Chase National Bank.

Q. You do not recollect that you did actually see any of the checks that Mr. Bush drew for these small amounts?

A. I probably have, some of them; but I have no distinct recollection that I did. I probably did, because I was in and out of the Loan Department looking over the daily receipts. If you want to bind it down to that particular check of April, 1893, I cannot tell.

Q. And the same statement would hold good as to any of the checks that were drawn for $175, or for $150, for interest—you may have seen them, or you may not?

A. Yes. If some of them were drawn to Mr. Bush individually and endorsed over to me they may have been addressed to me and have come to me on my desk. It would not have been part of my duty as vice-president to examine each one of those checks carefully to see how it was drawn.

REDIRECT-EXAMINATION:

At the time of this transaction I had known J. J. Bush I should say somewhere between two and four years. So far as I knew he was a man of good standing and reputation in the community at that time. I had not the slightest reason, so far as I knew, to doubt his right to do what he did on the day in question. He had been highly recommended to the bank as to his integrity and standing in the community. I recalled that at the time he became cashier of the bank he was R. G. Dun & Company's representative in Elmira, and had been for a good many years.

STEPHEN VOORHEES, a witness for the defendant, testified as follows:

I reside at Plainfield, New Jersey. I am New York agent of the Merchants' Bank of Halifax, a Canadian institution. I was connected with the Chase National Bank from September, 1889, to July, 1899. I was discount clerk on May 5, 1893. I was present at a part of the time when Mr. Porter and Mr. Bush were together. I was called by Mr. Porter with an electric button attached to my desk. When I was called for by Mr. Porter, I went into the president's room of the Chase National Bank and found Mr. Bush and Mr. Porter seated at a table in the office, and on the table I saw a satchel that Mr. Bush I had seen before have in his hand, which he had brought in, and also a package of currency, and a check was lying there. As I came in Mr. Porter said to me, "Mr. Bush has come down to pay his loan for $15,000 and he has brought with him $8,000 in currency and a check for $7,000 on Philadelphia, to be used in the payment of that loan. I have explained to Mr. Bush that a check on Philadelphia, owing to the unsettled condition of affairs at present and the stringency which exists, is not available to pay his personal loan, and I have suggested to Mr. Bush that he deposit this

check for $7,000 for collection for account of the Elmira National Bank, and also deposit the currency for the credit of the bank and draw a draft for $15,-012.50 in order to pay the loan and interest." This money and the check were handed to me together with the check which was already drawn of $15,-012,50, and I took the money and the check, as directed, and handed the money to our teller to be credited to the account of the Elmira National Bank, and handed the check to our collection clerk to be entered for collection for account of the Elmira National Bank. I then took the check for $15,012.50, which was signed by Mr. Bush, and handed it to our loan clerk, and told him that that check was to be used in paying the loan of $15,000, the balance due from Mr. Bush.

I had seen Mr. Bush there that morning before Mr. Porter arrived. I had been expecting him. Mr. Porter told me the day before that he had telephoned for him; and it was my custom to get to the bank about 9 o'clock. When I reached there Mr. Bush was seated inside the railing of the bank. I spoke to him and said, "Good morning," and in the course of the conversation he said: "I have come down to pay my loan." I said, "Yes; Mr. Porter told me he had telephoned you." And I said, "I expect Mr. Porter to be here probably about 10 o'clock." The table that was in that room was a large table for use in the directors' room, something the size, perhaps, of the table there; and in the middle of the table there was a large inkstand and at either end were two small inkstands, and there was a supply of pens. I don't recollect whether I saw Mr. Bush write the word "Cashier" on the face of that check. Before I left Mr. Porter said to me that Mr. Bush was on his way to Philadelphia, going over to Philadelphia from the bank, and he wanted to leave the collateral with us, and when he returned he would call and take it with him to Elmira. Mr. Bush did not return and it was left with us and was

not taken away. That was said in Mr. Bush's presence.

CROSS-EXAMINATION:

I have testified on two previous occasions about this matter. I think that the Quaker City $7,000 draft was entirely filled up, including the word "Cashier," before I saw it. I don't recollect whether it was or not. I could not swear positively. I think the $15,012.50 check was also filled up and signed when I first saw it. Mr. Bush's note and collateral remained in the possession of the bank as long as I was connected with it.

The deposition of James J. Bush, taken on behalf of the plaintiff, at Elmira, on October 5, 1900 (at the taking of which Mr. Whitney represented the plaintiff, and Mr. Thacher, the defendant), was read in part by the defendant as follows:

(From the examination by Mr. Whitney.) I was the cashier of the Elmira National Bank at the time of its failure in May, 1893. I remember the transaction of May 5, 1893.

I recognize the book now shown me as the individual deposit ledger of the Elmira National Bank containing the credits and charges against each depositor in that bank. The officers of the Elmira National Bank, who were accustomed to sign drafts of that bank drawn on other banks were the cashier and assistant cashier. The president might sign them at rare intervals, but it was not customary. The assistant cashier was Mr. E. A. P. Smith, now deceased.

(From the examination by Mr. Thacher.) The Elmira National Bank was formed in the fall of 1889, if my memory is right. I assisted Col. David C. Robinson in getting the stock subscribed among some friends of mine, and I took some stock myself and became one of the original directors. I con-

tinued to be a director until the close of the bank, I think.

It is admitted that Mr. Bush was appointed cashier in January, 1890.

I continued as cashier until the failure of the bank, and also as secretary of the Board of Directors. Mr. C. E. Selover continued to be connected with the bank until early in 1891. When he left or resigned as president of the bank, I think Mr. Frank C. Straat did not continue with the bank. I think their stocks were sold simultaneously.

Q. And from that time who were the controlling persons in that bank?

Objected to as immaterial and incompetent. Objection overruled. Exception.

A. Col. D. C. Robinson and Mr. Jackson Richardson. The stock that they were holding and purchased represented a majority of it.

Plaintiff moved to strike out that portion of the answer beginning with the words, "The stock that they were holding," as immaterial and incompetent.

Motion denied. Exception.

Q. The stock that stood in your name, together with that in Mr. D. C. Robinson's name, was a controlling interest in the stock, was it not?

Same objection. Objection overruled. Exception.

A. It was at the last days of the bank very nearly a controlling interest, I should say.

When Mr. Selover left the bank in 1891 Mr. Jackson Richardson succeeded him as president and director, and continued to be president until the close of the bank. Previously he had been vice-president. I think Mr. E. A. P. Smith was not

assistant cashier during the whole of my cashiership. I think there was no assistant cashier who preceded him. I remember that Mr. C. C. Swan was teller. The books will show whether he was assistant cashier. I think he was one of the officers of the bank from its organization. Mr. Smith took up his duties, I should say, in 1892 some time. His duties began when Mr. Swan resigned. Mr. Selover signed cashier's drafts until I came there. He was the only signing officer. After I became cashier I think that I signed them. I mean that he signed them when he was home, and when he was away I signed them. Selover continued as president after I became cashier until about January or February of the following year, when Jackson Richardson was elected president. I think Swan signed as assistant cashier some of the drafts, because at times I was out of the city, but I would want to refer to the book of drafts to refresh my memory as to that. I don't recollect Mr. Richardson's signing such drafts. He had the power to sign, but whether he ever signed or not I don't know. My recollection is that I never saw his name as president at the foot of our drafts.

There has been a previous trial of this action. It took place in New York.

Q. And you attended there was a witness on behalf of the plaintiff?

A. The Government, that is Gale as Receiver of the Elmira National Bank. I think I was subpœnaed. At least I was written to and asked to come. I don't know whether I received a formal subpœna. Elmira is over 200 miles from New York. I testified on the trial of that action.

I think I kept a deposit account in the Elmira National Bank from the time of its organization. In keeping that account it was the practice to write in the bank ledgers the overdraft balances in red ink, so that they appeared readily to the eye in looking through the books of the bank.

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Q. Now, as a matter of fact, did the books of the bank show overdrafts in your account?

Objected to on the ground that it was immaterial whether or not there were overdrafts in his account. Objection overruled. Exception.

A. I should say that the books of the bank showed my account overdrawn from time to time, as it would any other customer's.

Q. I am not asking as to whether the account was actually overdrawn, but as to whether it appeared on the face of the books of the bank that it was overdrawn?

Same objection. Objection overruled. Exception.

A. Yes, sir; the same as any other man's account.

Q. And that apparent overdraft on the books of the bank was very frequent in occurrence in your account?

A. I would not be able to say how frequently, but I should say it was more than once Not very frequently as I understand it. I should want to refer to the books to show that (examining ledger). I find the overdraft January 21, 1893, was $25. The books will show the actual number of times that the account was overdrawn. Books were open to the inspection of all the officers and clerks of the bank.

Q. And was there any attempt to conceal your overdrafts ever made by you?

Same objection. Objection overruled. Exception.

A. No, sir; never. No objection was ever made to my overdrafts.

Q. Mr. Bush, you drew other drafts as cashier of the Elmira National Bank to your own order be-

sides the $7,000 Quaker City draft which has been mentioned, did you not?

Objected to on the following grounds:

1st. As immaterial and incompetent as against the Elmira National Bank.

2d. That it cannot be any evidence of a course of business, because it does not appear that any of them came to the attention of any of the directors of the bank.

3d. That it is no evidence of any course of business because the directors of the bank could not lawfully have given Bush any general power to issue drafts in his own favor for his individual debts.

4th. Because no evidence as to prior drafts to Bush's individual order would justify the draft in question, which is admitted to have been payable to Bush as cashier—that is, to the Elmira National Bank when received by the defendant.

5th. That the defendant was put on notice and inquiry as to the true ownership of the $7,000 draft by this endorsement by Bush as cashier and as it made no inquiry it is not in a position to appeal to any course of business as to drafts to Bush's individual order, were it conceded that such a course of business existed.

6th. That the defendant, by presenting this $7,000 draft for payment to the Philadelphia bank represented to that bank and to the Elmira National Bank that it represented a mere transfer of funds of the Elmira Bank from Philadelphia to New York, and it is estopped to assert the contrary.

7th. On the ground that the whole transaction testified to by Porter was irregular and outside of any course of business and that, therefore, cannot be sustained by any proof as to a course of business,

8th. The only evidence by which the defendant could to any extent be relieved from liabil-

ity to repay the whole amount would be evidence that the $15,000, or some part thereof, was not the property of the Elmira National Bank, and that is neither pleaded or proved.

Plaintiff's counsel stated that this objection was made both to this question and to this entire line of testimony as to drafts drawn by Mr. Bush to his own order prior to the draft of May 5, 1893.

The Court: Naturally all the points were presented on the argument of this case before the Court of Appeals. Now, it seems to me that when Mr. Porter took the $15,000 check he took a check which was certified to by Bush as cashier. He took a check purporting to make the Elmira Bank liable by the certification, but as such certification was a void certification as a matter of law, it created no liability on the part of the Elmira Bank, because a bank cashier has no right to certify his individual check given in payment of his individual debts, and there was no sort of evidence that that course of proceeding had ever been encouraged or ratified by the directors of the Elmira Bank. Now, what I call the question of importance and perhaps one that is not entirely clear, is whether, having taken that, the defendant can in any case interpose a defense to justify the Chase National Bank in retaining the proceeds of the $7,000 Philadelphia check and the $8,000 currency. The Court of Appeals decided against the plaintiff on that point. They may have been wrong, but I have got to carry out the law as it was construed by the Court of Appeals. Therefore the defense which was introduced, to wit, a justification of the bank, the Chase National Bank, in taking the $7,000 Philadelphia draft and the $8,000 in currency was permitted, and upon this trial I cannot reconstrue or alter or attempt to alter the opinion of the Court of Appeals.

Objection overruled. Exception.

A. Yes, sir.

I drew some that were made out to my own order. I drew such drafts as cashier in my own case. I drew some in my own case that were made to my own order.

Q. And also some in your own business that were made out to the person to whom you desired to make payment?

On objection of plaintiff this question was excluded.

Q. All of those drafts regularly came back to the Elmira National Bank, did they not?

A. Yes, sir.

Q. And were kept among its vouchers?

A. Yes, sir.

Q. And unless they were lost they were handed over to the Receiver on the termination of the bank?

A. Yes, sir.

Q. They remained open to the inspection of the clerks and officers of your bank, did they not?

A. They were there in the bank.

Q. And open to the inspection of any director or officer who desired to examine them?

A. Yes, sir.

Q. When those drafts came back they were in the regular course of business inspected by employees of the bank?

On objection by plaintiff this question was excluded.

Q. And persons in the employ of the bank other than yourself?

On plaintiff's objection this question was excluded.

Q. In the case of some of these drafts you gave your check drawn against your account in the Elmira National Bank to pay for them, did you not?

A. Yes, sir.

Q. And these checks were always submitted for

inspection in the course of business to an employee other than yourself?

On objection by plaintiff this question was excluded.

Q. And these checks remained in the custody of the bank for a considerable period before they were delivered to you?

A. Yes, sir.

Q. Was there any attempt, in any of these drafts drawn to your own order or otherwise in your own business, to conceal the fact that you were drawing drafts as cashier in your own favor?

A. No, sir.

Q. Was any objection ever made to your drawing such drafts?

Objected to as immaterial. Objection overruled. Exception.

A. No, sir.

Q. Was any objection ever made to your drawing drafts to your own order?

Same objection, ruling and exception.

A. No, sir.

Q. And none to your drawing other drafts in your own business?

On objection, this question was excluded.

Q. How far back did your practice of drawing such drafts in your own name extend?

A. I would not be able to state, but I should judge from the first time I wanted a draft.

Q. And from that time on whenever you wanted a draft in your own business you drew it?

Objected to as immaterial, and not confined to drafts to his own order. Objection overruled. Exception.

A. Yes, sir.

Q. Just as you would for anybody else?

A. Yes, sir.

Q. Do you know of other officers of the bank drawing drafts in their own favor?

On objection by plaintiff this question was excluded.

Eight drafts of the Elmira National Bank on the Chase National Bank, being drafts subsequently marked Exhibits Nos. 4–11, inclusive, being produced by plaintiff's counsel from among plaintiff's papers and shown to the witness.

These eight drafts were all drafts signed by me as cashier and issued to me by the Elmira National Bank. They were all duly returned to the Elmira National Bank after payment by the bank on which they were drawn, in the regular course of business, and remained among the vouchers in the bank.

Q. Was any objection ever made by any one to the issuing or using of any of these drafts?

Objected to on the same grounds as made to the general question asked Mr. Bush, namely, immaterial, and that not any of these drafts came to the knowledge of the directors of the bank. Objection overruled. Exception.

A. Not that I ever heard of.

Draft No. 6598 I should say that I mailed to the Chase National Bank.

Q. Do you know for what you made that payment to the Chase National Bank?

Objected to as immaterial. Objection overruled. Exception.

A. I don't know of any way of telling what it was for, except it was for a loan they were carrying. I should say that, to the best of my recollection, the draft is connected with my money due them on account of that loan, namely, the same one which was represented by that note upon which $15,000 was due on May 5, 1893.

Check offered in evidence. Objected to on the grounds previously stated, and also on the ground that it is for too trivial an amount to form any precedent for a draft of $7,000. Objection overruled. Exception. Marked Exhibit No. 4.

Exhibit No. 4.

" ELMIRA NATIONAL BANK. No. 6598.
"$170. ELMIRA, N. Y., April 2, 1891.
" Pay to the order of J. J. Bush, Esq.....$170 83
" One Hundred Seventy ^{83} ----------^{100} Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Apr 4 1891
" Chase
" National
" Bank."

Endorsed:
" Pay Chase National
" Bank or order.
" J. J. BUSH."

I endorsed draft No. 9293 to the order of the cashier of the Chase National Bank. I don't know for what purpose, if it was not in connection with that loan. I don't know of any other indebtedness whereby I would be paying him. I think interest payments were called for every thirty or sixty days, along about the first of the month. From the fact that the amount is in cents and odd figures the best of my recollection is that it went to pay interest on the loan that they were carrying for the bank on the stock; this $15,000 loan in question. It was originally $25,000, and reduced by payments to $15,000, I believe.

Draft offered in evidence.
Same objection ruling and exception.
Marked Exhibit No. 5.

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Exhibit No. 5.

" ELMIRA NATIONAL BANK. No. 9293.
" $129. ELMIRA, N. Y., Aug. 8th, 1891.
" Pay to the order of J. J. Bush.....$129 17
" One Hundred Twenty Nine 17/100 Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Aug. 10, 1891
" Chase
" National
" Bank."

Endorsed:
" Pay W. H. Porter,
" Cashier, or order.
" J. J. BUSH."

I know of no business in which draft No. 14,674 could have been given, except for the interest on this loan in question. To the best of my recollection it was for the interest due on that same loan.

Draft offered in evidence.
Same objection, ruling and exception.
Marked Exhibit No. 6.

Exhibit No. 6.

" ELMIRA NATIONAL BANK. No. 14,674.
" $96. ELMIRA, N. Y., March 8, 1892.
" Pay to the ordar of J. J. Bush.....$96 11
" Ninety Six 11/100 Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Mar 9."

Endorsed:
" Pay Chase Natl. Bank
" New York
" J. J. BUSH."

The five remaining drafts identified by the witness as above were then severally offered in evidence Plaintiff objected separately to each draft on the grounds above stated, and also on the ground that it is not connected with anything. In each case the objection was overruled and plaintiff excepted.

These exhibits are as follows:

Exhibit No. 7.

" ELMIRA NATIONAL BANK. No. 5925.
" $35. ELMIRA, N. Y., Feby. 17, 1891.
" Pay to the order of J. J. Bush $35 21/100
" Thirty Five 21/100 ..... Dollars.
" To the Chase National Bank, } J. J. Bush,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Feb 20 1891
" Chase
" National
" Bank."

Endorsed:
" Pay John Bennett
" or order.
" J. J. BUSH."
" John Bennett."

(Stamped)
" Pay to The Order Of
" Western National Bank, N. Y.
" For account of
" Chemung Valley Bank,
" Horseheads, N. Y.,
" JOHN BENNETT, Cashier."

(Also stamped):
" Endorsement
" Western
" National
" Bank.
" Guaranteed."

(Also stamped):
" Western National Bank,
" Paid
" New York."

— —

Exhibit No. 8.

" Elmira National Bank. No. 13316.
" $50. Elmira, N. Y., Jan. 15, 1892. 18
" Pay to the order of J. J. Bush.....$50^{00}
" Fifty .....^{00} Dollars.
" To the Chase National Bank, } J. J. Bush,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Jan 19 1892
" Chase
" National
" Bank."
Endorsed:
" J. J. Bush."
(Stamped):
" For deposit in
" Chemical National Bank.
" to the credit of
" Brokaw Brothers.
" Per. J. K. Armstrong."
(Also stamped):
" Endorsement correct
" Jan 18 1892
" Chemical Nat'l Bank."

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Exhibit No. 9.

" ELMIRA NATIONAL BANK No. 13318.
" $100. ELMIRA, N. Y., Jan. 15, 1892. 18
" Pay to the order of J. J. Bush .....$100^{00}
" One Hundred ..... ^{00} Dollars.
" To the Chase National Bank } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:

" Paid
" Jan 22 1892
" Chase
" National
" Bank."

Endorsed:

" J. J. BUSH."

(Stamped):

" Pay
" National Park Bank
" New York
" Or order, for Collection, for Account of
" The Gate City National Bank
" Atlanta, Ga.
" EDW'D S. MCCANDLESS,
" Cashier."

(Also stamped):

" The National Park Bank
" of New York.
" Paid."

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Exhibit No. 10.

"ELMIRA NATIONAL BANK. No. 14179.
"$30. ELMIRA, N. Y., Feby. 18, 1892.
"Pay to the order of J. J. Bush.....$30^{00}
"Thirty.....^{00} Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:

"Paid
"Feb. 26, 1892
"Chase
"National
"Bank."

Endorsed:

"Pay Wm. B. Coffin, Esq.
"or order.
"J. J. BUSH."
"Pay to the order of
"Cit. Nat. Bank.
"Hornellsville, N. Y.
"W. B. COFFIN."

(Stamped):

"Pay Hanover Nat'l Bank,
"New York, or order, for collection and acc't of
"Citizens' National Bank,
"of Hornellsville, N. Y.
"J. E. B. SANTEE, Cashier."

(Also stamped):

"Hanover National Bank.
"Paid
"Feb. 26, 1892.
"New York."

Exhibit No. 11.

"ELMIRA NATIONAL BANK. No. 16196.
"$5. ELMIRA, N. Y., May 6th, 1892.
"Pay to the order of J. J. Bush $5.00
"Five ..... 100 Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"May 11 1892
"Chase
"National
"Bank."

Endorsed:
"Pay F. A. Skilton or order
"J. J. BUSH."
"Pay to the order of
"Mrs. George Fullman
"F. A. SKILTON."
"Mrs. G. G. Fullman.
"G. G. Fullman."

(Stamped):
"Pay American Exchange Nat'l Bank,
"New York, or Order, for account of
"The National Bank,
"of Auburn, N. Y.
"E. H. AMY, Pt."

(Also stamped):
"Am. Ex. Natl. Bank,
"Paid
"May 11 1892
"and
"Endorsement guaranteed
"New York."

(From the examination by Mr. Whitney.) When I stated that to the best of my recollection some of these drafts were used for certain purposes, I mean I could not recollect any other purpose for which

they were put. I can't say that I remember any particular draft. I have this recollection, that there was that loan, and that I was paying interest on it, and so far as I can recollect that is what Exhibit Nos. 4, 5 and 6 were used for. I can't say that I recollect any one of these individual drafts. I should say that draft No. 13,318 (Exhibit No. 9), was given for some of the expenses connected with the bank's matters in Georgia. These expenses were incurred for the Elmira National Bank's benefit.

Q. You think that this check of $100 was in some way or other used for the purposes of the Elmira National Bank?

A. Entirely so; yes, sir.

Plaintiff moves to strike out from the evidence said check Exhibit No. 9 as used for the purpose of the Elmira National Bank, and not for the witness' personal benefit. Motion denied. Exception.

Referring to Exhibits Nos. 4, 5 and 6, I recollect that I was making payments at short intervals of interest on the loan at the Chase Bank. I would use drafts of the Elmira National Bank to make such payments. I used such drafts during that period for that purpose.

Witness identifies fifteen drafts of the Elmira National Bank drawn on the Chase National Bank, signed by the witness as cashier, and drawn to the order of the cashier of the Chase National Bank, and states that all of them were returned to the Elmira National Bank after payment, and remained among the vouchers of that bank. Said drafts were of various dates, running from May 4, 1891, to March 3, 1893, and of amounts varying from $75 to $360. Marked Exhibits Nos. 13-27, inclusive, for identification. Said drafts and all evidence concerning their purpose or use were objected to by plaintiff on the ground that they were not drawn to the

order of J. J. Bush individually. Objection sustained.

Questions subsequently put to the witness Lee as to what interest payments on the loan of the Chase Bank to Bush were made, and whether said fifteen drafts, Exhibits Nos. 13 to 27 for identification, were received by the Chase Bank for interest on that loan, on objection by plaintiff, were also excluded.

Witness identifies two drafts of the Elmira National Bank drawn on the Chase National Bank, signed by the witness as cashier, one of them for $4,997.50, drawn to the order of the Importers and Traders' Bank, dated February 21, 1891, and the other for $5,000, drawn to the order of C. E. Selover, dated March 2, 1891, and states that they were signed by him, and returned to the Elmira National Bank in the regular course of business. On objection by plaintiff, questions as to the use of these drafts were excluded, on the ground that they were not drawn to the order of Bush.

Q. Who were the controlling persons in the management of the Elmira National Bank actually?

Objected to as immaterial. Objection overruled. Exception.

A. Mr. Richardson, Mr. Robinson and myself had more to do with the running of this bank than any of the others.

Q. As a matter of fact, was your management of the affairs of the bank interfered with by any one in any way?

Same objection, and also as too general, and asking for conclusions of the witness. Objection overruled. Exception.

A. I think that my management of the affairs of the bank was so generally in accord with the management of the bank that no one interfered with me, either in my conduct, or the way I per-

formed my duties in the bank. It was not a fact that all of those details were practically entrusted to my sole judgment. Our Board of Directors had an Examining Committee to pass on all our loans. We had an Auditing Committee who looked over our books and occasionally lines of loans would be cut down. We had besides myself in the bank's office permanently employed several clerks.

Plaintiff's counsel produces from the papers in the hands of the plaintiff three drafts of the Elmira National Bank, drawn on the National Bank of North America. Said drafts were offered in evidence by defendant. They were objected to as immaterial and not connected with the case.

Objection overruled. Exception. Marked Exhibits Nos. 30, 31 and 32, respectively.

These exhibits are as follows:

Exhibit No. 30.

" $300[00] ELMIRA NATIONAL BANK.
" $300. ELMIRA, N. Y., Oct. 5th, 1892.
" E. N. B. Pay to the order of J. J. Bush.....
" Three Hundred .....Dollars.
" To the Nat'l Bank of North America, } J. J. BUSH,
" No. 266. New York, N. Y. } " Cashier."

Endorsed:
" J. J. Bush."
(Stamped):
" Am. Ex. Nat'l Bank
" New York
" Oct 1892
" Paid
" Endorsement guaranteed."

" Alfred M. Harkness & Co."

(Also stamped):
"Pay American Exchange Nat. Bank,
"New York,
"Or Order for Collection Account of the
"Tradesmen's National Bank,
"Philadelphia.
"Frank G. Rogers,
"Cashier."

Exhibit No. 31.

"$200[00] ELMIRA NATIONAL BANK.
"$200 ELMIRA, N. Y., Oct. 5, 1892.
"E. N. B. Pay to the order of J J. Bush.....
"Two Hundred.....Dollars.
"To the Nat'l Bank of North America, } J. J. BUSH,
"No. 267 New York, N. Y. } "Cashier."

Endorsed (Stamped):
"Am. Ex. Nat'l Bank
"New York
"Oct. 1892
"Paid.
"Endorsement guaranteed."

"J. J. Bush."

"Alfred M. Harkness & Co."
(Also stamped):
"Pay American Exchange Nat. Bank,
"New York,
"Or order for Collection Account of the
"Tradesmen's National Bank
"Philadelphia.
"Frank G. Rogers,
"Cashier."

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Exhibit No. 32.

" ELMIRA NATIONAL BANK.
" 500^{00}. ELMIRA, N. Y., Dec. 13th, 1892.
" E. N. B. Pay to the order of J. J. BUSH.....
" Five Hundred.....Dollars.
" To the Nat'l Bank of North
" No. 331. America, } J. J. BUSH,
" New York, N. Y. } " Cashier."

Endorsed:
" J. J. BUSH."
(Stamped):
" E
" First Nat'l Bank, N. Y.
" Dec.
" 22
" 1892
" Paid "
(Also stamped):
" Pay E. Scofield
" Cashier, or order for account of
" First National Bank,
" Marietta, Ga.
" C. S. MCCANDLISH,
" Cashier."

These three drafts were signed and endorsed by me. They were returned to the Elmira National Bank after payment in the due course of business, and remained among the vouchers of that bank.

(From examination by Mr. Whitney.) I believe that the three of them were used in connection with the Southern land litigation. They were used for the benefit of the bank's litigation.

Q. Were they used to cover any expenses or sums which were used for your individual benefit?

A. I believe that they were used in the expenses which went to make up our litigation. That is my best recollection.

(From examination by Mr. Thacher.) I don't think that I ever told the officers of the bank that I had used them. I think they were used in connection with our attorneys, and they knew that we were going there, and we did what was necessary to save our claims in that country. I have no independent recollection of those drafts and am testifying merely from my conclusions from seeing the endorsements, and knowing that we had that litigation there.

(From examination by Mr. Whitney.) Q. What was that litigation, what was it called?

A. The President of the Bank against The Evans Land and Lumber Company of Ellijay, Georgia, not far from Atlanta, I guess.

Plaintiff moves to strike out these three drafts on the ground that it does not appear that they were issued by Mr. Bush for his individual benefit, but on the other hand that they were used for the benefit of the bank. Motion denied. Exception.

Plaintiff admits that the Elmira National Bank had an account with the National Bank of North America at the time those drafts were made.

Plaintiff's counsel produces from among the papers in the hands of the plaintiff a draft of the Elmira National Bank on the Chase National Bank.

Received in evidence. Marked Exhibit No. 33.

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Exhibit No. 33.

"ELMIRA NATIONAL BANK. No. 23,404.
"$77. ELMIRA, N. Y., Feby. 15th, 1893.
"Pay to the order of J. J. Bush. $77 50/100
"Seventy Seven $\frac{50}{100}$ ..... Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"Feb 16 1893
"Chase
"National
"Bank."

Endorsed:
"Pay J. T. Mills, Jr.,
"Cash or order.
"J. J. BUSH."

(From examination by Mr. Thacher.) This draft was signed and endorsed by me. Mr. Mills was an officer of the Chase Bank. I can only tell in a general way the purpose for which this draft was given to the Chase Bank. I know of no other indebtedness that I would have had with the Chase National Bank, except in connection with that loan, which was finally $15,000. Other payments were due as interest from time to time as often as the Chase Bank called for them. I should say every sixty or ninety days. I think once a month, some of the time. I don't think it was always regular in that respect. In 1893 they became more urgent about that loan.

Plaintiff's counsel produces from among the papers in the hands of the plaintiff, a check and draft, as follows:

Exhibit No. 35.

"ELMIRA NATIONAL BANK. No. 643.
"$600. ELMIRA, N. Y., March 1, 1893.
"Pay to the order of M. L. Greider, Esq...$600.00
"Six Hundred.....Dollars.
"Hide and Leather National Bank } J. J. BUSH,
"New York. } "Cashier."

Endorsed:
"M. L. Greider."
(Stamped):
"The German American Bank.
"Paid
"Mar. 30, 1893
"New York."
(Also stamped):
"For Collection & Credit to
"First Nat. Bank of Mount Joy, Pa.
"M. M. BRUBAKER, Cashier."
(Also stamped):
"Pay German Amer. Bank, N. Y.
"Or Order for Account of
"Commercial National Bank of Pa.
"Philadelphia.
"E. P. GRAHAM, Cashier."

Exhibit No. 36.

"ELMIRA, N. Y., Feby 28, 1893. No....
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to order M. L.
"Greider.....$600.00
"Six Hundred.....Dollars
"Hold for present Dft. Hide No. 643.
"J. J. BUSH."

Stamped across the face:
"Elmira National Bank
"Paid
"Apr 5 1893
"Elmira, New York."

It was admitted that the Elmira Bank then had an account with the Hide and Leather Bank of the City of New York.

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I signed that check and signed the draft as cashier. The check was given for the draft. The draft was issued for the check. I paid it to Greider in my own private business. It was returned to the Elmira National Bank after payment in the regular course of business, and remained among the vouchers of the bank, as did the check.

Check and draft offered in evidence by defendant. Objected to on the grounds above stated, and on the ground that the draft was not drawn to the order of J. J. Bush and did not indicate on its face that it was drawn in his private business. The objection was held under advisement by the Court, and afterwards overruled. Plaintiff excepted. The draft and check were marked Exhibits Nos. 35 and 36, respectively.

Plaintiff's counsel produces from among the papers in the hands of the plaintiff

Exhibit No. 38.

" ELMIRA NATIONAL BANK. No. 24580.
" $500. ELMIRA, N. Y. March 31, 1893.
" Pay to the order of Mutual Life Insurance Co.
" $500^{00} Five Hundred.....^{00} Dollars.
" To the Chase National Bank, } J. J. BUSH,
" New York. } " Cashier."

Stamped across the face:
" Paid
" Apr 3, 1893
" Chase
" National
" Bank."

Endorsed (stamped):
" For deposit in
" American Ex. Nat'l Bank,
" To credit of
" The Mutual Life Ins. Co.
" of New York."

(Also stamped):
" Endorsement
" Guaranteed
" Apr 1 1893
" American Exch. Nat. Bank."

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Exhibit No. 39.

" ELMIRA, N. Y. 3/31 1893. No.
" ELMIRA NATIONAL BANK.
" Pay to the order of Dft. to Mutual Life Ins. Co.
" 500^{00} Five Hundred.....Dollars.
" J. J. BUSH."

Stamped across the face:
" Elmira National Bank
" Paid
" Apr. 1 1893
" Elmira, New York."

I signed the check and signed the draft as cashier. The check was given to the Elmira National Bank for the draft. The draft was issued against it. The check remained among the vouchers of the Elmira National Bank. The draft was returned to us in the regular course of business after payment and filed among the vouchers of the bank. I believe the check was used by me in my private business. I don't know for what purpose now. It is too large a draft for premium on life insurance. I don't think the Mutual Life Insurance Company had any relations with the Elmira National Bank. It was given in some business other than the business of the Elmira National Bank. It was a draft paid for by me, and drawn at my request. I might have given it to my father, but my check paid for it.

Draft and check offered in evidence by defendant. Same objection. Objection was taken under advisement, and was later overruled. Exception by plaintiff. Draft and check marked Exhibits Nos. 38 and 39, respectively.

Plaintiff's counsel produced from among the papers in the hands of plaintiff, two drafts of Elmira National Bank on the Chase National Bank, signed by J. J. Bush, Cashier, dated March 31, 1893, to the order of H. K. B. Brown (who was a brother of J.

J. Bush): one for $100, and the other for $128.50, and a check dated March 31, 1893, drawn by J. J. Bush on the Elmira National Bank to the order of "dfts. H. K. B. Brown" for $228.50, also a draft of Elmira National Bank on Quaker City National Bank, signed by J. J. Bush, Cashier, dated May 3, 1893, to the order of H. K. B. Brown for $100, and a check dated May 3, 1893, drawn by J. J. Bush on the Elmira National Bank to the order of "dft. to Henry K. Bush Brown" for $100: also, draft of Elmira National Bank, signed by J. J. Bush, Cashier, dated 31st March, 1893, to order of Charles F. Jenkins, for $257.50, and a check dated 31st March, 1893, drawn by J. J. Bush on the Elmira National Bank to the order of "dft. to Charles F. Jenkins for H. K. B. B."

(These papers, and evidence as to their use on objection by plaintiff's counsel on the ground that they were not drawn to the order of Bush, were excluded.)

Plaintiff's counsel produces from among the papers in the hands of the plaintiff

Exhibit No. 47.

"ELMIRA, N. Y., April 3, 1893. No.
"Central Trust, 300
"Chase, 77 50
"ELMIRA NATIONAL BANK.
"Pay to the order of Dfts. on N. Y. $377 50
"Three Hundred Seventy seven 50 ..... Dollars.
"J. J. BUSH.

Stamped across the face:
"Elmira National Bank
"Paid
"Apr 4 1893
"Elmira, New York."

Exhibit No. 48.

"ELMIRA NATIONAL BANK. No. 24657.
"$300. "ELMIRA, N. Y., April 3rd, 1893.
"Pay to the order of Central Trust Co... $300^{00}
"Three Hundred ..... ^{100} Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"Apr 5 1893
"Chase
"National
"Bank."

Endorsed (stamped):
"Pay Merchants' Nat'l Bank,
"For Credit of the
"Central Trust Company
"of New York.
"O. H. P. BABCOCK,
"Secy."

(Also stamped):
"Merchants' Nat'l Bank,
"New York.
"Apr. 4 1893
"Paid."

Exhibit No. 3.

"ELMIRA NATIONAL BANK. No. 24658.
"$77. ELMIRA, N. Y., April 3rd, 1893.
"Pay to the order of Chase National
"Bank..... $77 50
"Seventy seven ^{50} ..... ^{100} Dollars.
"To the Chase National Bank, } J. J. BUSH,
"New York. } "Cashier."

Stamped across the face:
"Paid
"Apr 4 1893
"Chase
"National
"Bank."

Plaintiff admits that they were signed by Mr. Bush, and were not used for the purposes of the Elmira Bank, but objects to their admission in evidence on the grounds above stated.

There was evidence that Bush was in the habit of sending a bank draft monthly in payment of interest on his $25,000 note to the Chase Bank, and evidence tending to show that said $77.50 draft was for interest upon that note.

Objection to the said check and drafts overruled in each case, and exception in each case by the plaintiff.

The $77.50 draft marked Exhibit No. 47.

The Central Trust Company draft marked Exhibit No. 48.

The check corresponding to said exhibits marked Exhibit No. 3.

Plaintiff admits that none of the checks to the order of third parties which have been admittd in evidence were for the benefit of the bank in any way.

Defendant reads in evidence the following by-laws of the Elmira National Bank:

"Sec. 25. All contracts, checks, drafts, &c., and all the receipts for notes received from the Comptroller of the Currency shall be signed by the President or Cashier."

"Sec. 26. There shall be appointed by the Board of Directors a committee of three members whose duty it shall be to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, count its cash, compare its assets and liabilities with the amounts in the general ledger * * * and to recommend such changes in the matter of doing the business as shall seem proper. The result of such examination shall be reported to the Board at the next regular meeting thereof."

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Defendant reads from the directors' minutes of The Elmira National Bank passages showing that on July 1, 1892, the resignation of C. C. Swan, as assistant cashier, tendered by letter dated April 15, 1892, was accepted and E. A. P. Smith was appointed teller, and was authorized upon furnishing satisfactory bonds to sign drafts and certifications in the absence of the president, vice-president and cashier. It was afterwards admitted that the last draft signed by Swan as assistant cashier was in April, 1892, so far as can be found.

Defendant further read from the minute book passages showing that the directors elected at the stockholders' meeting on January 13, 1891, were as follows: Jackson Richardson, Thomas S. Flood, E. L. Wyckoff, John Brand, John J. Bush, C. E. Selover, Henry E. Rosenbaum, Jacob B. Coykendall, Frederick H. Richardson, Rufus T. Peck, Charles Kellogg, F. Straat and Judson H. Clark for the year ensuing; also at a meeting of the Board of Directors, on the same day, that Judson H. Clark, J. B. Coykendall and Frederick H. Richardson were appointed the examining committee; that Charles E. Selover was elected president and Jackson Richardson vice-president; that on March 2, 1891, the directors accepted the resignation of Mr. Selover and elected Mr. Jackson Richardson president and Mr. C C. Swan director; also that at a meeting of the directors on September 1, 1891, D. C. Robinson was elected director in the place of H. L. Rosenbaum, resigned, and L. H. Drake in the place of F. Straat, resigned; that on January 12, 1892, at the stockholders' meeting the then Board of Directors thus constituted was re elected, except that E. R. Backer was elected in place of Thomas S. Flood, and that at the directors' meeting held on said day the following officers were elected, to wit: Jackson Richardson, president; Charles Kellogg, vice-president; J. J. Bush, cashier, and C. C. Swan, assistant cashier, and that the members of the Examining Committee were re elected; that on January 10,

1893, at the stockholders' meeting the Board of Directors thus constituted was re-elected, except that George Brand, H. C. Mandeville and Charles H. Carroll were elected directors in place of John Brand, Judson H. Clark and C. C. Swan; that at the directors' meeting on the same day the president, vice-president and cashier were elected, and that E. A. P. Smith was elected assistant cashier and Rufus T. Peck, Jacob B. Coykendall and Frederick H. Richardson were elected examining committee.

Plaintiff's counsel read Section 9 of the by-laws providing that the vice-president shall perform the duties of the president in case of his absence or inability to act.

Defendant's counsel resumes the reading of the examination of the deposition of J. J. Bush.

(From the examination by Mr. Thacher.) I have in my possession some checks drawn by myself on the Elmira National Bank and returned after payment of my vouchers. Some of my vouchers were not returned to me, and I have not got them in my possession.

I have with me certain checks of mine so drawn on the Elmira National Bank and returned to me. Among them are checks which, on their face, appear to have been drawn for drafts of the Elmira National Bank. Among them are thirteen which are now shown to me. These thirteen were all signed by me. The "Paid" stamp which is on all of them but one is the stamp of the Elmira National Bank, and the cut in the paper of the one that has not that stamp indicates cancellation by the clerk by placing it on the spindle. In the course of business, he would do that at the same time that he drew the draft indicated by the check.

I believe I received from the Elmira Bank the drafts indicated by or corresponding to the descriptions in these checks. I don't know on what bank

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these drafts were drawn, but I would believe that they were drawn on the Chase National. There is nothing in my recollection or in the drafts that would lead me to believe that, except it is the absence of the name of any other bank. When I drew a draft on any other bank, I entered the name of the bank on the check, so far as checks drawn for my personal drafts were concerned. I have every reason to believe that I received the drafts drawn against these checks. The said thirteen checks are eight checks subsequently admitted in evidence and marked Exhibits Nos. 51, 54, 55, 56, 58, 59, 60 and 66. One which was not offered in evidence and four which were formerly excluded, being marked Exhibits Nos. 61, 62, 63 and 68, for Identification. Two of the latter (Exhibits Nos. 63 and 68 for Identification) being for $100 and $30 respectively, were excluded on objection that the drafts drawn against them were not found, and that the checks did not specify that the drafts were to be the order of Bush. The checks were drawn to the order respectively of "Dft. to J. J. Bush" and "N. Y. Draft." Said Exhibits Nos. 61 and 62 for identification were as follows:

Exhibit No. 61 for Identification.

"ELMIRA, N. Y., April 18, 1892. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Cash for draft.....$500 00
"Five Hundred.....Dollars.
"J. J. BUSH.
"Count until return."
Stamped across the face:
"Elmira Nat. Bank,
"Paid
"Apr 27 1892
"Elmira, N. Y."

Exhibit No. 62 for Identification.

"ELMIRA, N. Y., Aug. 31 1892. No.
"ELMIRA NATIONAL BANK.
"Pay to order of Dft on N. Y. to order
"J. J. Bush $1,066 88
"Ten Hundred Sixty Six 88 ..... Dollars.
"Count in items.
"J. J. BUSH."

Stamped across the face:
"Elmira Nat. Bank,
"Paid
"Sep 8 1892
"Elmira, N. Y.

Witness testifies that for four of these checks, respectively, he received the drafts which have been received in evidence as Exhibits Nos. 4, 6, 10 and 11. Said checks were afterwards admitted in evidence and marked respectively Exhibits Nos. 51, 58, 66 and 59. They are as follows:

Exhibit No. 51.

"ELMIRA, N. Y., April 2, 1891. No.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft to J. J. Bush $170 83
"One Hundred Seventy 83 ..... Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Apr 3 1891
"Elmira, N. Y.
"Elmira National Bank."

Exhibit No. 58.

"ELMIRA, N. Y., Mch. 8th, 1892. No.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft. to order J. J. Bush. $96 81
"Ninety-six 81 ..... Dollars.
"J. J. BUSH."

Exhibit No. 59.

"ELMIRA, N. Y., May 6, 1892. No.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft. to order J. J. Bush..$5^{00}
"Five.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"May 6 1892
"Elmira, N. Y.
"Elmira National Bank."

Exhibit No. 66.

"ELMIRA, N. Y. Feby. 18, 1892. No. 284.
"ELMIRA NATIONAL BANK,
"Pay to the order of Dft. on New York....$30^{00}
"Thirty.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Feb. 19 1892
"Elmira, N. Y.
"Elmira National Bank."

The witness produces seven more checks, being five checks subsequently admitted in evidence and marked Exhibits Nos. 50, 53, 57, 64 and 65, and two which were excluded on the ground that they did not appear to have been drawn from drafts to the order of J. J. Bush. They were marked respectively Exhibits Nos. 70 and 71 for identification, and were for the respective amounts $400 and $649.82, and were each drawn to the order of "Dft. on Philadelphia."

These are some of the checks I referred to as drawn for drafts of the Elmira National Bank and

by it returned among my vouchers. They were all signed by me. The paid stamp on them is that of the Elmira National Bank. I believe that I received drafts of that bank on the banks indicated in the checks for the amount stated therein. I believe that the numbers 266 and 267 in the corner of the $500 check of October 5, 1892 (being Ex. No. 57) indicate the numbers of the two drafts which were given for that check; those numbers were made by me.

Q. I am asking you whether or not as a matter of memory you know whether in some cases in which you gave these checks you actually received drafts?

A. I cannot remember, Mr. Thacher, of taking a draft for any one of them, but from the face of them I believe I got drafts for them all.

Q. Did you get cashier's drafts of your bank at any time at all on checks that you drew on the Elmira Bank?

A. I know I did.

Q. Did you in cases where you drew checks showing on their face that they were drawn for drafts, as in the case of checks you have exhibited to-day?

A. I did, because I have seen some of them.

Q. Do you know whether you drew as many checks as you have exhibited to-day in that form on which you did not get cashier's drafts on the Elmira Bank?

A. I don't believe I did.

Q. Do you know?

A. I don't know absolutely and positively, but I am pretty sure that I got drafts for them.

Q. You have exhibited nineteen checks drawn by you on the Elmira National Bank to the order in some form or other of drafts, all of which appear to have been paid by the Elmira National Bank and returned to you as vouchers. Is it possible, from your recollection, that in so many cases as these you did not receive the drafts called for by those checks?

A. It is not possible.

Q. Is it possible that you did not receive them in a large proportion of those cases?

A. I do not believe so.

Q. As a matter of fact, have you not a strong belief that you did actually in almost every one of those cases receive such a draft?

A. It would require the evidence of the books to convince me that I did not receive the drafts in each one of the cases.

Q. Your conviction from your knowledge of the transaction is such that you feel very confident of it, is it not?

A. I believe that is what those checks were drawn for.

Q. And that they achieved the purpose for which they were drawn?

A. I do.

Q. They were all your transactions?

A. They were transactions connected with the drafts.

Q. If a check failed to bring the draft called for, you would be very apt to have some recollection of it, would you not?

A. I believe so.

The words "count until return" written on the corner of one of these checks (Ex. No. 61 for identification, dated April 18, 1892, for $500) and "count in items" in the corner of another (Ex. No. 62 for identification, dated August 31, 1892, for $1,066.88) mean carry the check as a cash item in the cash drawer, and do not enter it in my account until my return from some absence.

Plaintiff's counsel read a part of Bush's deposition which preceded the foregoing questions and answers, as follows:

(From the examination by Mr. Whitney.)

Q. (Referring to the two checks for $500 and $1,066.88 afterwards excluded, marked Exhibits Nos. 61 and 62 for identification, and stated to be for drafts on the Chase Bank.) It says in one case (Ex. No. 62

for identification), "Draft, New York to the order of J. J. Bush." But as we have failed to find any draft corresponding to that, isn't it possible that the phrase on the face of the check does not state what actually occurred after the check was put in, and that actually it was held as cash, and that cash was handed out instead of a draft on New York?

A. Well, of course, I am giving this testimony from the face of the instrument without any absolute knowledge of the facts. If the instrument is wrong, my testimony is wrong.

Q. You said you had a recollection that this was carried among the cash items for a while; if it was carried as a cash item it would be carried as cash taken out of the drawer; carrying a check as a cash item means carrying a check in the place of cash taken out of the drawer.

A. I don't know how that would operate. Of course the books would be the best evidence of that transaction. If you do not find that a draft was issued on any of the banks that is stronger, testimony than my memory.

Witness examines record of drafts on the Chase National Bank and states that he cannot find a draft corresponding to the check referred to.

Q. (Referring to the same two checks, Exhibits Nos. 61 and 62 for identification, afterwards excluded, one being drawn to the order of "Cash for draft" and the other of "Dft. on N. Y. to order J. J. Bush.") Isn't it possible that there were no drafts ever given for these two checks, but that after the checks were written out that it was changed and the cash taken out of the drawer and the direction as to counting written on the face of the check?

A. It may have been that that was done, but it was after the check was drawn. After examining the books, I am not as positive as I was at first that drafts were actually issued for those two checks, because I find no record of it. As to the other cases,

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where I have produced checks here, stating on their face that they are for drafts, I know nothing further than what appears on the face of the check. I have no knowledge other than of the draft books being correct.

Plaintiff's counsel also read from said deposition as follows:

(From examination by Mr. Whitney.) Six of the seven checks drawn on the Chase Bank are for drafts on Philadelphia, I believe. To the best of my judgment, they were used in the Southern litigation, the Ellijay litigation that I referred to yesterday. The expenses of this litigation were entirely for the benefit of the Elmira National Bank.

Plaintiff concedes as to the checks subsequently marked Exhibits Nos. 50, 53, 54, 55, 56, 60 and 64, that drafts were issued by the Elmira National Bank at the dates and for the amounts thereof respectively, which drafts cannot be found among the vouchers in the hands of the plaintiff; that there are some indications that at least one of the Philadelphia drafts was to the order of Bush; that the drafts corresponding to the checks, Exhibits Nos. 54, 55, 65 and 60, were drawn on the Chase National Bank; and that the books of the Elmira Bank do not show to whose order drafts on the Chase National Bank were drawn prior to October, 1892.

Defendant offers in evidence two of said six checks drawn for drafts on Philadelphia. Objected to on the ground, first, that the witness has testified that they were for the benefit of the Elmira National Bank; and, second, that it does not appear that the drafts issued for said checks were signed by Bush. Objection overruled. Exception. Checks marked Exhibits Nos. 50 and 53 respectively. They are as follows:

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Exhibit No. 50.

"ELMIRA, N. Y., Jany. 3, 1891. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to order of J.
"J. Bush $669 91
"Six Hundred Sixty Nine 91 ..... Dollars.
"on Merchants, Phila.
"J. J. BUSH."

Stamped across the face:
"Paid
"Jan. 5 1891
"Elmira, N. Y.
"Elmira National Bank."

Exhibit No. 53.

"ELMIRA, N. Y., April 15, 1891. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to J. J. Bush,
"Philadel $552 55
"Five Hundred Fifty two 55 ..... Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Apr. 16 1891
"Elmira, N. Y.
"Elmira National Bank."

Defendant offers four of the checks above testified to by Bush not stated to be for drafts on Philadelphia. Objected to on the second of said grounds, and on the ground that it does not sufficiently appear that any of the drafts drawn for said checks were to the order of Bush. Objection overruled. Exception. Said checks were marked severally Exhibits Nos. 54, 55, 56 and 60, and are as follows:

Exhibit No. 54.

"ELMIRA, N. Y. Aug. 31, 1891. No. 93.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to J. J. Bush..$100 00
"One Hundred.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Sep. 1, 1891
"Elmira, N. Y.
"Elmira National Bank."

Exhibit No. 55.

"ELMIRA, N. Y. Sept. 30, 1891. No. 129.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to order J. J. Bush $306 67
"Three Hundred Six $^{67}_{100}$.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Oct 1, 1891
"Elmira, N. Y.
"Elmira National Bank."

Exhibit No. 56.

"ELMIRA, N. Y. Dec. 31, 1891. No.
"ELMIRA NATIONAL BANK.
"Pay to the order of Dft. to J. J. Bush..$306 67
"Three Hundred Six $^{67}_{100}$.....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"Jan. 2, 1892
"Elmira, N. Y.
"Elmira National Bank."

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Exhibit No. 60.

" Elmira, N. Y. June 6, 1892. No.
" Elmira National Bank.
" Pay to the order of Dft. to J. J. Bush...$769 03
" Seven Hundred Sixty Nine 03.....Dollars.
" J. J. Bush."

Stamped across the face:
" Elmira Nat. Bank.
" Paid
" Jun 7 1892
" Elmira, N. Y."

Defendant's counsel also offered in evidence one more of said checks, and it was admitted and marked Ex. No. 57. It is as follows:

Exhibit No. 57.

" Elmira, N. Y., Oct. 5, 1892. No.
" Elmira National Bank,
" North America.
" Pay to the order of Drafts to J. J. Bush...$500 22
" Five Hundred.....Dollars.
" ♯ 266
" ♯ 267 J. J. Bush."

Stamped across the face:
" Elmira Nat. Bank,
" Paid
" Oct 24 1892
" Elmira, N. Y."

Defendant's counsel also offered in evidence three more of said checks, and on objection by plaintiff's counsel, they were excluded as above stated and marked Exs. Nos. 61, 62 and 63 for identification.

By Defendant's Counsel:

(From examination by Mr. Whitney.) I think that my deposit account in the Elmira National Bank was written up whenever the clerks got time. I don't think there was any regular time. I don't think that I have had the checks returned to me from that account; not in 1893. I am unable to say how often the checks were returned to me, but it was at long periods. They were all in the vaults and at my disposal. My pass book was not balanced as often as the ordinary account books would be. I have not my book. I would say that it was balanced every three to six months. When it was balanced, my returned checks would be placed with it, delivered to me, or placed at my disposal I think the Receiver has my pass book. I would be unable to say when I last saw it. When my pass book was balanced, I don't recollect that I ever complained of the balances in my favor being too small I didn't examine my account on the books of the bank very often. I would not be able to say how long before the failure of the bank I examined it for the last time. I couldn't say that I did not within a month or two. I presume in looking through this ledger I ran across my account, but I never went especially to look at my account at any time.

Q. Was it your duty as cashier to look up depositors' accounts in the bank, and to see how they stood? A. I tried to keep an account; yes, sir. I presume I saw every ones account including my own. I can't say whether I had looked over these accounts within six months before that time, because I was very busy during that time. It was the duty of the assistant cashier to report to me the overdrafts. I might not have taken that book in my hands and still have kept account of the overdrafts, and still have complied with my duties as cashier. I think it possible that I had not looked at the depositor's ledger for six months before the failure of the bank.

The vouchers which I have produced here were among the papers that my attorneys have. They have not all of my returned vouchers, but I sorted out all the vouchers that I thought would have any value to me in my cases under my indictment. The rest of them are at my house. I can't tell now, but I think November, 1892, was the last I had seen of my vouchers, because I do not find any others. The time when I looked my vouchers over was at the time of my trial, or our trial in Buffalo in 1896. I have not looked them over particularly since. My best recollection of what I found in 1896 is that November, 1892, are the last vouchers that I have. My recollection about it is based on what I found in 1896 when I looked these vouchers over. I obtained from my attorney's clerk all of the vouchers that he was able to find for me in my attorney's absence—checks of the Elmira National Bank. These were checks that I had sorted out previous to this deposition. When I sorted out the papers, I had a lot to go through. These particular vouchers that I produced here I went and got from my attorney at the request of a letter of Messrs. Reed, Simpson, Thacher & Barnum. At their request I produced them. I didn't do any sorting of them. They had been sorted out and separated from among the rest before I received this request, because my attorney and I thought that they would be wanted, and because they were for drafts to the order of J. J. Bush. I received this request by Thursday of this week.

All the drafts that were paid to the correspondent banks during the month were put together at the end of the month and returned to the Elmira National Bank. They were then compared by some one with the records of the Elmira National Bank to see if they tallied. I think the work was done by any one of the clerks who happened to be the least busy, sometimes by Mr. Smith, sometimes by clerks under him. These bundles were tied up again and put away in the vaults of the bank. There was a

loan committee of the directors and an examining committee. The examining committee was the committee which did the auditing of the books and papers of the bank, independent of the loan committee. I sometimes have seen that examining committee at work. They started by counting the checks and the cash items, and then I have seen them look at the depositor's ledger and the various books of the bank

(From the examination by Mr. Thacher.) If I was in the bank when they were examining, I would be apt to see every act of this committee. I would be busy a good deal of the time. I don't think that I saw everything that every member of that committee did. I couldn't say that I saw every act of every director when they were looking over the bank matters. The fact that my account on the Elmira Bank ledger appeared to be overdrawn did not give me any anxiety. The amount of its balance whether great or small was satisfactory to me.

I have no definite knowledge as to when I last examined my account in that book. My examination of my account on the ledger was not for the purpose of definitely ascertaining how that account was stated on those books. This case had not started when my checks were sorted out. They were sorted out by me in the gathering of papers that I felt it would be advisable to have on hand in view of any litigation that might come up.

Q. They were sorted out at whose instance?

A. My own.

Q. Sorted out by you as checks drawn for what purpose?

A. For drafts to my order.

Plaintiff's counsel read a part of the same deposition which preceded the part just read from the examination by Mr. Thacher.

(From the examination by Mr. Whitney.) These twenty checks of mine drawn on the Elmira National Bank and payable to the order of drafts were

the only checks of mine drawn on the Elmira National Bank and payable to the order of drafts wnich I was able to find in my possession. When I stated that all the drafts drawn by me on other national banks, which were produced yesterday, were drawn openly and without concealment, I mean that they were drawn like any other drafts in the course of business. I drew it and mail it and leave my check in the place of it. As soon as it was drawn it was supposed to be entered on the draft book. I know of no cases where it was not. It was immediately afterwards put in a sealed envelope and sent to some one. That is the way drafts would be used. It was not exhibited to any of the directors or the president of the bank. I think the Bank of North America had no draft book. I think the Quaker City Bank had one. The drafts on the Hide and Leather Bank were on stubs, and I guess the Bank of North America also. According to the course of business I believe that drafts were entered in the draft book or on stubs when drawn. There would be no stubs for the Hide and Leather Bank. It was to pay a debt, and went right on to the Hide and Leather book. In the case of a draft on the Chase National Bank there were no stubs. It was entered in a book, with an entry in the cash book and on the draft record, but of course the books would be the best evidence. (Draft book of the Chase National Bank exhibited to witness.) From September 23, 1889, to October 7, 1892, there was nothing there except the number and the amount and the date; the date on which the draft was drawn; the number of the draft; the amount of the draft; the exchange; and the day on which it was paid by the bank on which it was drawn. After October 7, 1892, one more column was added. That column contained the name of the payee of the draft. The name of the payee had not been preserved prior to October 7, 1892, in the draft book of the Chase National Bank.

Q. Was it ever customary to preserve the name of the person at whose request the draft was drawn?

A. That was in charge of my assistant, and I would have to refer to the books to give you an answer; I have no knowledge. It was not the custom in the Chase National Bank to enter this on the draft book. I don't remember any cases anywhere where it was customary to enter the name of any person on whom the draft was drawn. I would have to refer to the books of the bank, but I don't remember it. I think the drafts so drawn came back to the Elmira National Bank monthly.

Q. (Referring to the witness' statement that the method of doing business by the examining committee of the directors was to start by counting the checks and cash items and then look at the depositor's ledger and the various books of the bank) What else?

A. I should say that that was about the extent of their examination. I think the loan committee took charge of checking up the loans, so I don't think there was any other work for the examining committee. I never saw the examining committee examine the bundles of returned drafts from the Chase National Bank, or any of them, or bundles of returned drafts from any other bank, or the bundle of checks from any depositor. I never saw any director examine any of the checks of the depositors, or any of the drafts of our bank on other banks. There was no conversation between me and the directors of the bank at any time as to who signed any particular draft given by the Elmira National Bank on any other bank. I never saw any director of the Elmira National Bank look to see who signed any such draft.

Defendant's counsel offered in evidence three more of the checks produced by Bush and testified to by him as being for drafts, and on objection by plaintiff upon the ground above stated in

regard to said drafts they were excluded, being marked Ex. Nos. 68, 70 and 71 for identification.

Plaintiff's counsel stated that it appeared from the records of the Elmira National Bank that at the times of Exhibits Nos. 50 and 60 there was no assistant cashier of that bank, also that on the books of that bank one of its Philadelphia correspondents is credited with drafts corresponding in date and amount with two of the six checks for Philadelphia drafts produced and testified to by Bush.

Defendant's counsel offers in evidence one of said last mentioned checks. Same objection as to the check Exhibit No. 50. Objection overruled. Exception. Marked Exhibit No. 64. Said check is as follows:

Exhibit No. 64.

"ELMIRA NATIONAL BANK, No.
"ELMIRA, N. Y. 3/5, 1891.
"Pay to the order of Phila. Dft. to J. J. Bush
.....$400 00
"Four Hundred .....Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
Mar. 5, 1891
Elmira, N. Y.
"Elmira National Bank."

EDWIN A. LEE, a witness for the defendant, testified as follows:

I reside at South Orange, New Jersey, and have been since May, 1899, discount clerk in the Chase National Bank. I have been connected with that bank since September 16, 1889. I have in my hand a certain book of the Chase National Bank, the loan book. It includes a statement of the principal and interest payments on a loan by the bank to J. J. Bush

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of Elmira—a personal loan, as distinct from a loan to the Elmira Bank. It is a loan under date of February 18, 1891. The amount originally was $25,000. On May 5, 1893, it had been reduced by payments to $15,000, with unpaid interest, $12.50. The account shows monthly interest payments from the period included between February 18, 1891, and May 5, 1893, with one or two exceptions where the interest was quarterly. All that appears on the book. I have not computed the interest to prove that it is a correct account, but, from my best judgment and knowing the course pursued by the bank, I should say that the interest stated on the book was the proper amount. The book shows loans to the Elmira Bank, as well as to Bush individually.

I have here the books containing the original entries as to the transactions of May 5, 1893. They were entered partly in what we call a duplex and partly in a book called a collection registry. I have them here. There are two kinds of deposits. One is a deposit made by our New York City customers; another is a deposit made by our country banks, made by way of a letter. The latter deposits are accompanied by a letter, usually stating what the deposit is. When the deposit is not made by a letter and the draft or currency deposited does not come through the mails or by express, the usual custom is to have a letter made up. We have a form which we fill out. On some occasions we have deposit slips; other occasions we have not. When a deposit of currency is made in our bank, or when a check is deposited by some one then present, there is usually either a deposit slip or a letter of some sort handed in. Those letters and deposit slips are preserved. They are kept among the papers of the bank. That is the usual custom of the bank.

It is conceded that search has been made among the papers of the bank for deposit slips, but none has been found upon either the $8,000 or the $7,000 deposit of May 5, 1893.

CROSS-EXAMINATION by Plaintiff's Counsel:

The duplex book which I hold in my hand contains a set of original entries of the transactions of the bank on May 5, 1893. The book endorsed "Time Collections" contains at pages 81-3 an account in which are contained the original entries of drafts deposited by the Elmira National Bank for collection. The entry of the $7,000 Quaker City draft of May 5, 1893, reads as follows:

Date.	Payer.	Where sent.	Amount.	Date.	Check from	Paid.
May 5.	Quaker City National Bank.	Philadelphia.	$7,000.	May 4.	89.	May 8.

No. 89 is the number of our account with the Elmira National Bank.

Q. That entry differs in no respect from the entries of other drafts deposited by the Elmira National Bank for collection at various times, does it? It is the usual form of collection entry, is it not? I mean it does not indicate on its face that the sum when collected was to be devoted to any particular purpose?

A. It does not show here. It does not appear to be a special deposit in any way.

It is conceded that there is no entry on the duplex of the $8,000 item, and that an explanation of the absence of it will be afforded later on on behalf of the Chase National Bank.

I find on the duplex an entry of the check of $15,012.50 on May 5, 1893. The entry next following is the entry of the payment of the J. J. Bush loan, I should say. It would be identified by the number. The number of the loan was 8952. The entry is as follows:

" Charge.	Credit.
" $15,012.50 Cash, Dft.—Elmira National " Bank, N. Y.	
" Demand Loan No. 8952	$15,000 00
" Interest	12 50 "

It is admitted in lieu of further cross-examination of Mr. Lee that the cashier of the Chase National Bank is here, and personally states that in regard to the deposit of the $8,000 currency on May 5, 1893, according to the usual custom, if no deposit slip had been made out, the currency would appear as a credit in the duplex form, and hence he believes that a memorandum letter of some sort was made out by somebody covering this item, but the letter he is unable to find after making a thorough search.

CHARLES F. GALE, recalled and examined on behalf of the defendant, testified as follows:

I never knew Mr. Bush while he was cashier of the Elmira National Bank. I had no connection with the bank or its books until after Mr. Davis became receiver. I gained some insight into the books four or five days after I became assistant to Mr. Davis. I never knew of or heard of any one connected as an officer of the Elmira Bank other than Mr. Bush, its cashier, whose initials are J. J. B.

[DEFENDANT RESTS.]

Deposition of JACOB B. COYKENDALL, taken at Elmira, October 6, 1900, read in evidence on behalf of the plaintiff, as follows:

I reside at Elmira, N. Y. I was a director of the Elmira National Bank at the time of its failure, and had been so for two or three years previously. I was one of the examining committee of the Board of Directors, I think about two years. The other members of the committee were F. H. Richardson and J. H. Clark. I was an active member of the committee and personally conducted the examinations. Mr. Clark very seldom came, but Mr. Richardson was always there with me. I think we were both always present at the auditing of all the books

and papers by the committee. The auditing was done every two or three months.

Q. And how was it done? What steps were taken by the committee?

A. We first took the notes and tabulated them and added them up, and then added to that amount the various notes that had been sent off for collection, for rediscount, to see if they balanced with the discount ledger—I mean the notes of the various persons that had been discounted at the bank. We then counted the cash to see that it agreed with the balance. That was the main part of it. There were no other steps that I remember.

Q. Did you ever examine any of the returned drafts from the Chase National Bank, or other corresponding banks?

A. No, sir.

Q. Did you ever examine any of the checks of the depositors in the bank?

A. No, sir.

Q. Did you ever have your attention called in any way to the question which officer of the bank signed these drafts on other banks?

A. No, sir.

Q. Did you ever have any conversation with Mr. Bush as to whether or not he was signing drafts to his own order?

A. I knew nothing about that at all. No, sir.

Q. So far as you were aware, was there ever any conversation by any of the directors of the bank in reference to this matter?

A. Not that I was aware of; no, sir.

I am in the insurance business at Elmira. I am thirty-six years old. I have named all of the people who were on that examining committee that I can remember of now. There might have been a change in the committee, but I don't remember it. The only committeeman that acted with me, as I said before, was Mr. Richardson. That I am absolutely sure of. I don't remember when I was appointed a member of the committee. Frederick H.

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Richardson was the man that acted with me in the examinations. I think the other man was Judson H. Clark. I would not be surprised to find from the record that somebody else was on the examining committee. I know the two members that did the examining, the members of this committee. There might have been other members on the committee, but we looked this over, that I know. I don't know that the other members did not make any examination, except those that Mr. Richardson and I made. I don't remember of Mr. Peck's being a member of the examining committee. I did not know for a certainty who was signing cashier's drafts on our bank. I don't know what the other directors individually knew about that. So far as I was personally concerned, I left it to Mr. Bush's personal judgment and control as to how he signed those drafts. I don't mean by the last answer that I ever had any conversation with Mr. Bush about it. Mr. Richardson was a shoe manufacturer in Elmira. Mr. Clark was a capitalist and breeder of live stock in the neighborhood of Elmira.

Plaintiff put in evidence from the directors' minutes the report of the examining committee for the year 1891 for the sole purpose of showing that the members of the examining committee who acted on the committee and signed the report were J. B. Coykendall and Frederick H. Richardson. Plaintiff also offered the report from the directors' minutes of the examining committee for the year 1892, made December 13, 1892, for the sole purpose of showing that it recites the examination as having been made by J. B. Coykendall and F. H. Richardson, although it is signed by Richardson alone.

CHARLES F. GALE, recalled and examined on behalf of the plaintiff:

The records, papers, vouchers and books of the Elmira National Bank have been in my custody and under my care since the time I first went there. So far as I am aware they are still in my possession, except those which have got into the possession of the lawyers in this case. I have not been able to find Mr. Bush's pass-book among my papers. I have searched for it. I never saw it. There were no checks of Mr. Bush's that had been paid by the Elmira National Bank, found by me in possession of the bank outside of those checks and vouchers which were handed over to plaintiff's attorneys at the time of the last trial of this case. Those checks and vouchers went back I think to about the first of April or last of March prior to the failure of the bank. They were all produced here, and examined by the two parties to this case on the previous trial. I have looked to see whether there were any vouchers of Mr. Bush's between November, 1892, and these vouchers in the possession of the bank, but I never found any. I don't know of any draft books or stub books of drafts drawn by the Elmira National Bank on other banks which came into the possession of Mr. Davis as Receiver, except those which were here in court. I have searched through the papers for all draft books and stub books. I have found no trace or indication of any ledgers, day books or cash books which are not in court. I have found some drafts that have not got any stub book or draft book to correspond with them. I don't know whether those drafts were drawn out of a stub book or not. I don't know anything about it. There has been an examination made of the returned checks or drafts which had been drawn by the Elmira National Bank on the Chase National Bank and afterwards returned by the latter, to find out how many of them were to the order of J. J. Bush. The examination was made by myself and Mr.

Hickok and Mr. Thacher, defendant's counsel. I placed all of those drafts that I knew about at the disposal of Mr. Thacher for his examination. I have found three other drafts among Mr. Davis' papers. They are not to Mr. Bush's order. I have made a search to find out whether there were any other returned drafts that have got out of place. I have not found any.

Plaintiff's counsel reads from the general ledger of the Elmira National Bank an entry of April 16, 1891, crediting the Merchants' National Bank of Philadelphia with $552.55 (being the amount of the check Exhibit No. 53).

The drafts now shown me came from my custody. They are the drafts drawn by the Elmira National Bank on the Chase National Bank on April 16, 1891, all of them. They are all signed by C. C. Swan as assistant cashier.

Said drafts offered in evidence for the purpose of showing that C. C. Swan was the person signing drafts of the Elmira National Bank on said day. Said drafts (fifteen in number) marked Exhibit P.

The search for those drafts was made under my supervision. There has not been found any drafts signed by Mr. Bush on that day. That search I instructed to be made thoroughly.

Plaintiff reads in evidence an entry in the ledger of the Elmira National Bank under date of May 11, 1891, a credit to the Corn Exchange Bank of Philadelphia of $653.05.

The package of papers shown me contains, so far as search has shown, all the drafts drawn by the Elmira National Bank on the Chase National Bank on May 11, 1891. My instructions to the officers making the search were to make as thorough a search in this case as any other.

Papers received in evidence and marked Exhibit PP. They are all signed by Swan.

The book shown me is the Elmira Bank's record of the drafts drawn by the Elmira National Bank on the Chase National Bank during the entire connection of those banks. It is the book which was referred to by Mr. Bush in his deposition. My knowledge of the book is simply from the fact of having found it among the books of the bank.

Plaintiff's counsel reads in this book the entry of September 1, 1891, of the draft No. 9,784, drawn by the Elmira National Bank on the Chase National Bank for the sum of $100.

The bundle of papers now shown me are all the vouchers which have been discovered on the search made by me which are returned drafts drawn by the Elmira National Bank on the Chase National Bank on September 1, 1891. We have not been able to find the draft corresponding to check Ex. No. 54.

Drafts received in evidence. Marked Exhibit Q Three of them are signed by Swan and eleven by Bush.

Plaintiff reads from the same book an entry of a draft drawn October 1, 1891, by the Elmira National Bank on the Chase National Bank, No. 10,515 for the amount of $306.67, stating that this was one of the drafts which they had been unable to find (see check, Exhibit No. 55.)

Plaintiff offers in evidence the bundle of drafts of the date of October 1, 1891. Received and marked Exhibit R. They are signed four by Swan and fifteen by Bush.

Plaintiff reads from the same book the entry of the draft drawn by the Elmira National Bank on the Chase National Bank No. 12,938 on January 2, 1892, for $306.67 (see check, Exhibit No. 56).

Plaintiff offers in evidence the bundle of vouchers found on the examination described by Mr. Gale, being all the vouchers of January 2, 1892, which were found, and not containing

said voucher No. 12,938. Received and marked Exhibit S. They are signed three by Swan and twenty-six by Bush.

The vouchers which were thus examined are the same which I furnished Mr. Thacher three weeks ago for the purpose of his examinaion.

Mr. Thacher states that he made a very rapid and hasty examination of about one-third to one-half of the drafts which Mr. Gale exhibited to me as all the drafts of the Elmira National Bank in his possession; that he did not discover any to the order of J. J. Bush that have not been offered in evidence to day; that he was assisted by a young man and does not think that the latter found any to the order of J. J. Bush other than those which have been offered in evidence; that he had no opportunity to ascertain whether those were all of the drafts which had been drawn by the Elmira National Bank or not; that they were in a very mixed condition.

On my examination I found among all of the returned vouchers only the ones that have been produced here to the order of J. J. Bush individually.

CROSS-EXAMINATION by Defendant's Counsel:

I became Receiver in May, 1896. From that time I suppose I am responsible for the safe custody or safe keeping of all the papers connected with the business of the Elmira National Bank, so far as I could. I have considered it my duty so to do. Prior thereto the papers and records were in the personal custody of Mr. Davis. He is dead. I never went over anything, except the vouchers in the fore part of the receivership extending as far back as December, 1892, and the vouchers of the other banks which have been produced here we examined only for the month of May.

I have made no detailed examination of the record or papers back of 1892; not to check up from the books at all. I am a bookkeeper myself with some experience. To ascertain whether I had in my possession all the cashier's drafts of the Elmira National Bank, I would go about it according to how the books were kept. It would be according to what records they kept. It would involve the checking up of the drafts with the entries on the books that properly should correspond to such drafts. I have never done that. No one has ever done it on my behalf, so far as I know. Certain papers or drafts bearing the name of J. J. Bush, have turned up or have been found which were not used upon the last trial. It was within two or three weeks that I made an examination of the papers and books of the bank for the purpose of satisfying myself or anybody else how many drafts J. J. Bush had drawn as cashier to his own order. I did it at my own instance.

The papers, checks and drafts of this bank when I first saw them, when I was acting as assistant to Mr. Davis, were in the bank building in a room that the bank occupied in the Robinson building, an ordinary brick building. I don't remember seeing any drafts or vouchers in the bank building. They were moved upstairs by the clerk. The first recollection that I have of seeing any drafts or canceled vouchers on any bank was when we moved upstairs. I could not state whether they were in the bank or not. The Receiver's office was moved upstairs into an office within two or three weeks after the Receiver took possession. Some of the drafts were done up in bundles, and some were not done in bundles. They were undone. I meant with a wrapper around them, a loose wrapper fastened with a pin. I have in town here all there is of them. There were a great many of them, a great many thousand. I don't know anything about how they had been kept of my own personal knowledge, until some time after

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the failure of the bank. The whole force of the bank was there part of the time under Mr. Davis when I acted as his assistant, and then it was reduced as their services were not needed. I could not state exactly how many there were in the whole force - four or five. They had ceased to perform any duties under the bank officers, and they went to work for the Receiver. I did not see them handle these papers, drafts and checks, and don't know whether they did or not. I first saw Mr. Bush a day or two after I became assistant to Mr. Davis. He was there in Elmira. He was in and out of the bank building from time to time, I should think. I can't recollect. I can't remember all about these little details. I remember seeing him in the bank building in the Receiver's office. I don't know whether he had free access to the Receiver's office or not. He came in when I was there. I knew of no orders to keep him out of the building. Mr. Bush was in the office frequently. I presume he is in Elmira yet. I did not know before the last examination of Mr. Bush on Mr. Whitney's notice that he was in possession of certain checks which have been offered in evidence here, reciting that the drafts had been given to his own order. Prior to this examination I had no communication with him as to whether he had such checks or drafts. So far as I know Mr. Swan is living. I do not know that any of the persons who were directors of the bank a few months before it failed are now dead, except Mr. Jackson Richardson. Shortly after the failure of the bank I saw from time to time some persons who were directors in a business way. I don't know whether I ever saw all of them or not. They were mostly residents of Elmira. I don't know anything about the stub book of the Merchants' National Bank of Philadelphia. I never found any stub book of the drafts on the Chase National Bank, which contained the names of the payee of such drafts. I never found any traces of any such

book. I never inquired of the vice-president or any former officer or director of the bank whether there was any such stub book kept. I never had occasion to. I never inquired of any such person whether there was any stub book that would contain the entry of the fact that drafts were drawn by J. J. Bush as cashier to his own order. I never had any occasion to inform myself. I did not do it. I have never compared the checks, Exhibits P, Q, R and S, with any book of the bank in order to ascertain whether they were all the cashier's checks that were drawn upon their respective dates. All my testimony amounts to is that I or somebody else have looked for certain drafts among the files or bundles of drafts of a certain day and found these, and have not found any others. There were in the Elmira Bank's record of drafts on the Chase National Bank twenty-one entries of cashier's drafts drawn October 1, 1891. I produced nineteen, and am unable to find any others. My attention has never been called to the discrepancy between the number of drafts and the drafts that I produced until you called it to my attention just now. The book thus shown me has been produced in Court and used as an exhibit before. I can't understand how it is that there are two drafts missing. I can't tell how many drafts of the bank are now missing from those that were in its possession at the time of its failure. I don't know anything about who took them. I don't know anything about it at all. There were eighteen drafts entered in the book on September 1, 1891, and I am able to produce only fourteen.

REDIRECT-EXAMINATION:

By my statement that I never examined the papers of the bank in detail back of November, 1892, I meant a checking up of the accounts as far as December, 1892. By checking up the accounts I mean going over each item separately and comparing it with the

Chase National Bank's account. I examined all of the vouchers in the bank since the last trial. I did it two or three weeks ago, since the deposition of Mr. Bush at Elmira. I examined them before I went to Elmira to attend that deposition, and since I went to Elmira. Mr. Thacher's examination was made before he went to Elmira. I examined or caused to be examined each one of the vouchers at that time. I went over as many as half of them myself anyway. Mr. Hickok went over the rest. He is a clerk for the Receiver of the Broome County Bank, at Binghamton. I procured his assistance to make this examination. He is a trustworthy person. He was instructed to look for every check that he could find drawn to the order of J. J. Bush. The matter of the investigation of checks or drafts to the order of J. J. Bush was first brought to my attention on the last trial. That was about a year ago. All the drafts back to December, 1892, were here present then. The earlier ones were in Binghamton. They were sent for, but not brought down, I don't think. Back to December, 1892, were the only ones that were here, I think. The papers that have been found since, that were not here on the last trial of this action, were drafts to the order of J. J. Bush during the whole existence of the bank. At the last trial all the vouchers were present back to December, 1892, on the Chase National Bank, and all the vouchers in my possession on any other bank, so far as I knew, for the existence of the Elmira Bank. The papers that have since been produced are the vouchers of the Chase National Bank prior to December, 1892. The vouchers which I have stated to be loose when I took possession of the bank were vouchers on banks other than the Chase National Bank. I did not find any loose vouchers of the Chase National Bank. The vouchers of the Chase National Bank prior to November, 1892, were done up with a paper strap around and pinned to-

gether. I should think there were 25,000 in the whole lot, one bundle for each month. They were done up in bundles, one bundle for each month. I don't know whether these bundles had ever before been opened since Charles Davis took charge as Receiver. I never knew of any of them being opened. Mr. Bush did not have access to the vouchers in the custody of the Receiver. He could go into the office at any time, it was open, I suppose, and find some one there. He could not examine the papers without leave. I was Mr. Davis' clerk and I suppose I had general charge of affairs. I was the person generally in charge of the office. Mr. Davis and I were both generally there.

Draft record of drafts drawn by the Elmira National Bank on the Chase Bank was put in evidence by plaintiff. Marked Exhibit T. It is described in the testimony of Mr. Bush.

It contains the name of the payee of each draft drawn by the Elmira National Bank on the Chase National Bank from October 7, 1892, until the failure of the former bank.

[During said period the drafts entered are about 5,987 in number, running from number 19,999 to number 26,085, inclusive.] This book only shows two drafts in this period drawn to the order of J. J. Bush, namely, the draft of February 15, 1893, for $77.50, Exhibit No. 34, entered under date of February 16, 1893, and a draft for $30 entered under date of February 11, 1893. It also shows a draft entered under date of January 4, 1893, for $200, as to which the entry of the person to whom it is drawn reads "F. & M. Spencer, N. Y., for Bush." This book shows that on January 2, 1892, thirty-four drafts were drawn on the Chase National Bank and subsequently paid.

Defendant offers in evidence another of the six checks stated to be drawn for Philadelphia

drafts. Objected to on the same ground as to the check, Exhibit No. 50, and also on the ground that the check is irregular on its face as appears by comparing the dates, and on the ground that it affirmatively appears that all the drafts which can be found among the vouchers that were signed on that day were signed by Mr. Swan, and none of them by Mr. Bush. Objection overruled. Exception by plaintiff. Marked Exhibit No. 65. It is as follows:

Exhibit No. 65.

"ELMIRA, N. Y., Aug. 9th 1891. No.....
"ELMIRA NATIONAL BANK.

"Pay to the order of Dft on Philadelphia, J. J. B.
"$653.05 Six hundred fifty three /05 Dollars.
"J. J. BUSH."

Stamped across the face:
"Paid
"May 11 1891.
"Elmira, N. Y.
"ELMIRA NATIONAL BANK."

Deposition of J. J. BUSH aforesaid.—Further extracts were read by plaintiff's counsel in rebuttal as follows:

I became cashier of the Elmira National Bank about 1890 or 1891. About the beginning of 1891, Jackson Richardson became president of the bank. He is dead.

I remember the transaction of May 5, 1893, at the Chase National Bank, when I drew and certified a check for $15,012.50, and deposited $8,000 in cash and a $7,000 draft on the Quaker City Bank of Philadelphia. The $8,000 cash was money belonging to the Elmira National Bank. It was in bills, in the

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ordinary currency of the country. I got it from the vaults of the Elmira National Bank. My recollection is that the assistant cashier and myself put up the bundle together. We put up this currency in a bundle. It came from the vaults of the Elmira National Bank. Either I took it or my assistant, Mr. E. A. P. Smith. No doubt he took it by my direction. The book shown me endorsed "day book" is our daily counter book. The entries in that book were of all moneys received by the teller and of all moneys paid out by the teller. The moneys received were entered on one side and the moneys paid out were entered on the other side. It was balanced every night. $8,000 was entered here on the morning of May 5th, with the entry "The Chase National Bank" opposite. The entry is in the handwriting of my assistant cashier. I should hardly be able to say whether I saw it made or not, because it was a good while ago. I have no knowledge that it was made on that date except what the books show. I have no knowledge except that I see it in the book. I recognize the handwriting of the entry. It is Mr. E. A. P. Smith's. The entry is under the date of May 5th. The currency was taken by me on the night of May 4th after the end of business hours. Any transaction whereby the currency of the bank was increased or diminished after the closing hours of the bank, the entries relating to that transaction would be placed at the top of the page for the next day's business. The bank book was balanced each day as near after three o'clock as the teller was successful in obtaining his balance; as soon as he could prove his cash. I mean that at the close of the banking day, it was the duty of the teller to add up the items on one side of the day book and the items on the other, and strike a balance, and count his money to ascertain whether or not his balance was correct. That is what I mean by "prove his cash." Money taken after hours would be taken by myself or the assist-

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ant cashier, and we entered the items, whether we took it out or put it in, on the page for the next day's business. This day book was a book of original entry. This $8,000 was the bank's money. I had ownership or interest in it only as cashier.

Said entry was admitted in evidence and marked Exhibit V.

The testimony of William J. Kinsley on the former trial of this action was read by plaintiff (the witness' personal attendance being dispensed with by consent), as follows: He was an expert on questions where ink was at issue, and had made a special study of chemistry in its bearing on ink; that it is practicable to determine whether two inks are the same or not by chemical tests; that he had examined the $7,000 Philadelphia draft, Exhibit No. 1, and also the $15,012.50 check in suit, Exhibit C, both with the microscope and with chemical tests; that in his opinion the words "J. J. Bush, Cashier," on the face of the $7,000 check were both written with the same kind of ink; that the word "Cashier" on the middle line of the check was written with a different pen from the words "J. J. Bush" on that line, and at some subsequent time, but with the same kind of ink; that the words "J. J. Bush" were blotted paler than the other; that in his opinion the ink on the endorsement of that check was quite clearly in a different ink and in the same ink as the words "seven thousand" on the face of the check; that the $15,012.50 check is all the same ink, and that in his opinion the ink used to write the $15,012.50 check was used to write the words "seven thousand" on the other check and also the endorsement on that check.

Deposition of J. J. Bush.—Further extracts were read by plaintiff in rebuttal as follows:

Q. Now, I call your attention to this $7,000 draft on the Quaker City Bank, and I would like to

ask you whether, when you presented that to the Chase National Bank it was payable to your order as cashier? My present recollection of that occurrence has naturally become indistinct. On the trial before Mr. Justice Smith some years ago I gave my recollection at that time. I have not seen my testimony for a good while. I do not know just exactly what it was. I remember that I was a witness on the trial before Judge Smith soon after the bank failed (witness examined the stenographer's minutes of his testimony on said trial). That is my testimony. It brings back to me what my recollection was at the time of the trial. I do not know of having seen anything since that would make my recollection different from that testimony.

Q. Was that your recollection at the time you gave your testimony?

A. I should say that was my recollection, because that was my testimony.

It was intended to be at the time my best recollection. It was intended to be true most assuredly. I haven't any memory of that draft beyond the general memory that I would have from giving testimony in that trial and the trial previous to it. I was not able to testify to anything more definite than that I believed that the word "cashier" was there when I signed it at Elmira, and that I had no recollection of changing it afterwards.

CHARLES F. GALE, recalled by defendant for further CROSS-EXAMINATION, testified as follows:

There is no other charge of the $8,000 item in any book of the Elmira National Bank other than Exhibit V. There is an entry of $7,000 in the book as of the same date. I see an entry of "J. J. B. $7,000," on May 5. I find another entry of it on the same date, Quaker City Philadelphia credited. I see no reason to doubt that this refers to the same draft.

Said entry of "J. J. B. $7,000" was received in evidence and marked Exhibit No. 73. It is in

the column of debits against the Chase National Bank.

The corresponding entry of credit to the Quaker City Bank on the same date was received in evidence. Marked Exhibit No. 75. It says $7,000, with no initials opposite.

An entry in the column of debits to the Chase National Bank's account for May 5, 1893, being the line next above Exhibit No. 73, was admitted in evidence on behalf of plaintiff as Exhibit No. 76, "Cy. $8,000."

By Plaintiff's Counsel:

"Cy." stands for currency, I suppose. My knowledge of banking does not permit me to explain the letters "J. J. B." opposite the $7,000 entry. It says, J. J. B. That is all I know about it. I am a banker and have been for about a year assistant cashier of the City Bank of Binghamton. Before I was in the Receiver's office of the Elmira National Bank, I was bookkeeper in the Merchants' Bank of Binghamton. I have been engaged in banking for about fifteen years, and am familiar with the system of bookkeeping employed by the Elmira National Bank as they kept the books. I am able to state from my knowledge about that system that if an entry of any amount was made in the account of a correspondent bank, accompanied by the initials of one of the depositors, if that entry related to individual business of the depositor whose initials were set out there, an entry about that would in the ordinary course of business also appear in his own account for the same date. The book now shown me contains the accounts of the individual depositors. There is no entry of $7,000 on J. J. Bush's account on any day in the month of May, 1893, up to the date when the bank closed its doors, on either the debit or credit side.

Deposition of EMERSON J. BATTERSON, taken at Elmira on October 26, 1899, read in evidence by plaintiff as follows:

I reside in Elmira, New York. I was bookkeeper in the Elmira National Bank from March, 1892, until the bank went into liquidation. I was not employed by the receivers after that. In May, 1893, I had charge of the general ledger. The entries in the accounts of the Chase National Bank and the Quaker City National Bank of Philadelphia during that month are in my handwriting. The course of business as to these entries was as follows: The various items came to me in different ways and were put upon a spindle on my desk; the check was generally made for each item; sometimes an item was called to me by one of the clerks and I would make the charge generally, and items were on checks charged during the latter part of the day; this is the way I got the items. These entries are the first entries that were made in the books of the Elmira National Bank of these items on the general ledger. Some came from other books. They came from various sources. The one balance that came from any book was entitled draft record. The items that came from the draft record went under the head of credits. None of the other items were transferred from any other account of the bank except as to the entries from the draft record. This book was a book of original entry. The slips, I think, were bundled up and marked the day they were used and filed away. They were preserved always, I think. I do not know what became of them when the bank closed its doors. The last time I saw them, I don't remember whether I did them up. I probably did. They were kept under the desk under the counter with other vouchers and old papers. The initials "J. J. B." opposite this item of $7,000 on the Chase National Bank's account is in my handwriting. The initials were used to identify the item. They do not refresh my

memory so that I can state anything further in regard to this item than I have already stated. I received the amounts credited to other banks shown in these accounts in some way. I did not receive them personally. The only knowledge I had of them was that they were transferred from the books and from the oral statements made to me. The balances shown in these accounts were made up from my previous entries in these accounts. According to the course of business the balances appearing on the books of the Elmira National Bank on a given day would probably not be the same as the balances on the books of the correspondent bank on the same day. There would be many items in transit.

The letters "J. J. B." opposite the item of $7,000 on May 5th were to identify the item. The putting of these initials before the different items were to assist us in looking them up afterwards. I do not know what these initials indicated in this entry. They stood for J. J. Bush. I do not know whether the item represented a check or draft. If it did, I do not know in what relation J. J. Bush stood to that draft as appearing on the face of the draft. I cannot now tell from my own entry what I intended to indicate by these letters.

CHARLES F. GALE, recalled by plaintiff, testified as follows: When I came into possession of the papers, I found bundles of deposit slips. I searched through the slips in my possession to find the slips from which these entries of $8,000 and $7,000 were made. I did not find them. It was a thorough search through all the papers made at the request of my counsel.

Deposition of WILLIAM B. EDSON, taken at Elmira on October 26, 1899, read in evidence by the plaintiff.

I gave Mr. Batterson some of the items for entry in the general ledger. I gave them usually on a

slip as I called them off. There was not in the regular course of business a method by which I gave him a slip or called off the amount to him. The slips were placed with the deposit slips on that day. I last saw them on the day the bank failed. They were in the vault. I have a recollection as to the $7,000 which appears on the Chase Bank account of that day.

Q. Did you give that item to Mr. Batterson?

The answer was excluded on motion of defendant's counsel on the ground that it appeared by his subsequent cross-examination to be hearsay.

[PLAINTIFF RESTS.]

Deposition of J. J. BUSH—further extracts read in evidence on behalf of defendant (from the examination by Mr. Whitney). I believe I had some individual moneys on deposit in the Elmira National Bank that were not entered, but there was no other account which any deposit I made could have gone into. The deposits which I think are not entered were on May 4, 5, and 6. I have made some discoveries in the last six months. I am looking it up. I have no information at present. I have no knowledge at first hand of it at present.

Q. A year ago you had no knowledge or information of any other moneys belonging to you that were not entered in that account?

A. Well, I knew that my account was not as it should be, but as to why I was unable to discover the reason.

Plaintiff moved to strike out this answer on the ground that it appears that it was entirely hearsay. Motion denied. Exception.

[DEFENDANT RESTS.]

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Plaintiff's Counsel: I understand that there is no question as to a verdict for the sum of $12.50, with interest for the plaintiff, but I understand that there are two defenses in mitigation of damages, one for $7,000 and the other for $8,000, with interest in each case.

I move for a direction of a verdict for the plaintiff for the full amount claimed for the reason that this transaction of May 5, 1893, is either one entire transaction, including those two deposits and the check, or is, as I claim it to be, two different transactions, one by which the moneys were deposited and the other by which the check was issued. In the latter case, of course, there is no defense. If the transaction is a single one, then, as has been held by the Court of Appeals in this case, it was an irregular transaction.

I make two claims: First, that there is no possible defense except by saying that this $8,000 and the $7,000 belonged to Mr. Bush, individually, or to some other person than the Elmira National Bank, which is not done. And in the second place, that the transaction being an irregular transaction, it was not in the ordinary course of business, and therefore not one in which Mr. Porter could take part without making inquiry. He is not protected by the rule that any transaction in the ordinary course of business protects a person who does not willfully shut his eyes to the facts. The transaction being irregular, it was the duty of a prudent man to make inquiry, and as Mr. Porter frankly states here that he made no inquiry whatever, the plaintiff is entitled to a verdict for the whole amount claimed.

Motion denied. Exception by plaintiff.

The Court then charged the jury as follows:

SHIPMAN, *J.*: Gentlemen of the Jury: This action was brought by the Receiver of the Elmira National Bank, which failed May 23, 1893, to recover from

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the Chase National Bank the sum of $15,012.50 and interest. The transaction occurred on May 5, 1893, and was of this sort.

Mr. J. J. Bush was the cashier of the Elmira National Bank. He had borrowed money of the Chase National Bank and had given his note for $25,000, payable at the Chase National Bank and secured by the stock of the Elmira Bank, which note had been reduced by payments to $15,000.

On the 4th day of May, 1893—which was, as you may perhaps recollect, during the time of the panic, commonly called the panic of 1893—the officers of the Chase National Bank telephoned to Bush that his collateral was not satisfactory and asked him to come down and settle the matter up, or improve the collateral. Mr. Bush came in response to this telephonic message on the morning of May 5th, bringing with him $8,000 in money and a draft of the Elmira Bank on the Quaker City Bank of Philadelphia for $7,000, which was originally made payable to the order of Bush individually or as cashier.

Bush said that with this money and draft he wished to take up his $15,000 note. Mr. Porter, the vice-president of the bank objected to the $7,000 draft on Philadelphia as there was delay with collections from Philadelphia, a panic in the money market, and some uncertainty about prompt collections from any Philadelphia bank. He said that as they wanted to use funds, and Philadelphia funds were not available to pay a note which was payable at the Chase National Bank, and therefore payable in New York funds, a different arrangement must be made. He asked Mr. Bush if he had a personal account with the Elmira National Bank and he said he had. Mr. Porter then suggested to him that he, Bush, should put the money to the credit of the Elmira National Bank and the $7,000 draft in its collection account, and that he should make a personal check for $15,012 50, the amount of the note and interest, on the Elmira

National Bank, payable at the Chase National Bank so that it would be in New York funds.

Mr. Voorhees, one of the clerks in the Chase National Bank, then brought the form which is ordinarily used in making such a draft, and Porter made it out and Bush signed it individually as maker, and certified and accepted it as cashier, and left the $7,000 draft and the money.

The check for $15,012.50 was immediately charged to the Elmira Bank and the currency was credited to it. The $7,000 Quaker City draft was nominally taken for collection and was collected and credited to the Elmira Bank on May 8th. The note and collateral were left with the defendant for safe keeping.

No notice of this transaction was given by Porter to the Elmira Bank, but this charge of $15,012.50 appeared on the defendant's account, which was rendered, after the failure of the Elmira Bank on June 6, 1893, to the Receiver, who brought this suit to recover the amount. The $8,000 in currency was embezzled by Bush from the Elmira Bank, and the use of the $7,000 draft was also an embezzlement.

If the transaction rested entirely upon the fact that Mr. Porter received this certified check for $15,012.50 in payment and discharge of Bush's individual debt, there would have been no doubt as to the illegal character of the transaction and of its invalidity as against the Elmira Bank, because Mr. Porter took in payment of Bush's debt his individual check upon the Elmira Bank, payable at the Chase National Bank, which was certified by Bush as cashier. There is no evidence tending to show that Bush had any real or apparent authority for this certification or to make the check payable at the office of the defendant. The certification was invalid because it was the certification of the cashier's individual check given and received for his individual benefit, with no authority either to certify it or to make it payable elsewhere than at the office of the Elmira National Bank.

The certification by a cashier of his own individual

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check is void, irrespective of the question whether he had funds in the bank to meet it, for he could not act in regard to the same check in two capacities, both as drawer and as endorser, to bind the bank for its payment.

The importance of this case turns upon another set of facts to which I will now call your attention. You will see that Bush, as cashier, certified his own individual check for $15,012.50, and that he left the currency, $8,000, and the Quaker City draft for $7,000. Consequently, whatever is to be found about the liability of the defendant to repay $15,000, there is no question that it is liable to repay $12.50 and interest from May 5, 1893, and your verdict will be for the plaintiff for that sum at least.

The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. You will see that, with the exception of this $12.50, I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into.

The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. Now, this money, this currency, was without question taken by Bush from the vaults of the Elmira bank without authority, and was its property, but inasmuch as it was currency or money, bank bills, if it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained.

That principle is well settled and it is settled because it is regarded as necessary in business that when currency has been offered by one man to an-

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other who is his creditor, the creditor can retain the currency if he received it in good faith, in due course of business and for the payment of a valid debt, although those bills have been stolen from somebody else, but the question is in regard to the good faith of the recipient.

This, of course, applies particularly to the $8,000 but it is also true that if both the Quaker City draft and the $8,000 were received in bad faith with knowledge, or with adequate reason to know that Bush was delivering the property of another which he had illegally and wrongfully obtained, then the Chase National Bank cannot retain the proceeds of such fraudulent conduct by its vice-president.

But the plaintiff in attempting to establish bad faith, takes the burden of proof and you are to examine the circumstances of the case, mindful that Mr. Porter has testified to his good faith, and see whether the circumstances are such as to satisfy you that his testimony is not sustained by the facts, or that the facts are such as to satisfy you that, notwithstanding his testimony, he acted in bad faith.

What were the facts to justify this act? It was a time of business panic of extreme character. The Chase National Bank telephoned to Mr. Bush that he must pay his debt or deposit more satisfactory security. That message was sent to Elmira in the afternoon. Bush appears the next morning with $8,000 in his bag. The plaintiff says that it was very unlikely that an individual would have $8,000 of his own in currency which he could produce immediately; that the fact that a bank cashier appears with $8,000 in currency to pay his own debt is a fact which should suggest fraud and embezzlement; that if he owned that amount or had that amount in currency it would be natural for him to deposit it and bring the amount in his individual check rather than be subjected to the risk of loss in transit.

Furthermore, the plaintiff says that the fact that he brought the Quaker City draft, drawn by himself

as cashier, to pay his own debts was another suspicious circumstance, and that the conduct of Mr. Porter in having everything placed to the credit of the Elmira Bank and getting the Elmira Bank's certification of Bush's check, shows an indisposition to receive the $8,000 from Bush as an individual, and that the reason given by Mr. Porter for the form in which the business was done is an inadequate excuse.

Then there has been some testimony, upon which comment was made, that the Quaker City draft was originally made to the order of Bush as cashier. You will recall that Mr. Porter says that that check was made to the order of Bush, but when Bush turned the check over and endorsed it, he endorsed it as J. J. Bush, Cashier, following the ordinary habit of a man to use the name which he had been accustomed to use, and then when it was turned back it was seen that he had endorsed it as cashier, whereas it was payable to his own order, and that the word "Cashier" was afterwards written.

Now Bush thinks, although he is not very strong in it, the other way. All I have to say to you on that point is, if the draft was originally to the order of Bush as cashier it would have been a singular circumstance, because the draft itself would have shown upon its face that it was the property of the Elmira Bank. I do not think myself, gentlemen, that there can be be very much question in regard to this fact. I think undoubtedly the testimony of Mr. Porter is correct on this point. It is more positive than anybody else's testimony, and it seems to me to be supported by the probabilities.

And now, while I am on that question, whether the face of that draft was to the order of Bush or to the order of Bush, cashier. If you find upon the question of bad faith that there was no bad faith, I do not think that the fact of the alteration of the check or the addition of "Cashier" upon the face of the check will be of any importance to your further consideration of the case, because I think

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the question whether that addition was made or not is of principal importance in regard to the good faith of the transaction.

Now, what is on the other hand? The defendant says that there were no facts in the case to suggest to Mr. Porter any suspicion when he had telephoned to Bush to come down and give additional security or settle, and he came down; that Bush's position was that of one of responsibility; that his character was, so far as Porter knew, high; that he came promptly; that he appeared well; that there was no apparent worriment in his mind; that the business was done quietly; that there was nothing to suggest to his mind, and it did not occur to him that the circumstances which seem most suspicious should seem suspicious to him; that he did not think anything about it, and that not thinking that there was anything wrong, there was no occasion for him to make any inquiry.

If you find that the $8,000 in currency was received in good faith you will, as a matter of course, find that the $7,000 draft was also received in good faith.

Now, we come to the question in regard to the $7,000 draft, which is the one upon which most time has been occupied, and that depends upon this principle of law.

In the absence of any authority in the cashier to draw cashier's drafts to his own order in payment of his individual debts, the person who receives such a draft in payment of a cashier's individual debt takes the risk of being obliged to pay the draft to the bank. The case proceeds upon that principle which is the same principle that I have already told you about in regard to the improper certification by a cashier of his own check. If a cashier has no authority to issue a cashier's draft to his own order in payment of his own debts the creditor who takes such draft takes the risk of a cashier's lack of authority, although he may have had individual funds upon deposit.

The general authority of the cashier to draw drafts or checks on the bank in the conduct of his business does not by itself permit him to draw such drafts or checks in payment of his personal debts, or to raise money for the transaction of his personal business. When, therefore, he draws a draft or a check on the bank payable to his own order, and for his own individual debt, the party acting thereon takes the risk that he may act without authority to do so.

Now we come to the other side of the principle. But, if it appears that the agent had repeatedly done such acts on previous occasions, and that such acts had been ratified and not repudiated by the officers of the corporation, then, providing such acts have been done for a period sufficiently long to establish a settled course of business, it may be inferred from the general manner in which they have been done that such acts were known, or ought to have been known, by the directors, and that the cashier had authority.

The question in this case does not turn upon an express authority conferred upon Bush by his Board of Directors to use the funds of the Elmira Bank for his personal benefit, or to draw cashier's drafts to his own order, because there was no such expressed authority, and there is no evidence that the Board of Directors actually knew that Bush was pursuing this line of conduct.

The question turns upon an implied authority, which is to be inferred from the proved acquiescence of the Elmira Bank in Bush's prior assumption of authority.

The authority of a cashier may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of a corporation as represented by its Board of Directors. When, during a series of years, and in numerous business

transactions, he has been permitted, without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between his bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operation. His authority is to be implied from the acquiescence of the directors in permitting an officer during a series of years to pursue a particular course of conduct, and this acquiescence is derived from their actual knowledge or from what should have been their knowledge of the conduct of the course of business of the officers. In this case no actual knowledge has been proved, but the point in the case is the inference to be derived from what the directors should have known by a proper examination of the course of business of their cashier.

Testimony in regard to this point, this course of business of the cashier, has been presented in a mass of papers. The trouble or difficulty in a jury's ascertainment of a fact of this sort is because a mass of papers must necessarily be presented, and must be presented to you sitting in a box, without an opportunity to study them, to make memoranda or to analyze the facts which they may show. The difficulty is that when, after a long trial, a mass of papers has been presented to the jury they cannot recollect the dates or the amounts, and without an opportunity of classifying the facts which they show, clearness of memory cannot reasonably exist. Therefore, I must take some pains to summarize the facts which have been presented to you.

Upon the former trial of this case in this Court nine drafts from October, 1892, to May, 1893, five of them to the order of creditors, and amounting in all to $2,630, were shown. Three of these drafts given to the order of creditors were the Grider draft for $600; $500 to the Mutual Life Insurance Company, and $300 to the Central Trust Company, and

two for about $150, in all to the order of the Chase Bank.

The Court of Appeals said that those nine drafts, five of them for $1,550 to the order of third persons, and $2,630 in all were not sufficient to establish a settled course of business during the series of years. A draft given to the order of creditors by the cashier does not disclose that that draft was in payment of his own private debt, and an auditing committee when they came to look at such a draft, would not know that Bush had given it for his own purposes because they would not know that Greider was his individual creditor or that the Mutual Life Insurance Company was, or that the Central Trust Company was.

Three of these nine drafts, amounting to $1,000, were upon the Bank of North America. Upon this trial those three drafts turned out to have been in the Elmira Bank's business. Of those nine drafts which have been presented here five of them were to creditors and three of them, to the amount of $1,000, were in the bank's business. If this testimony had stopped there the implied authority would have been weakness itself and we should have been just where the Court of Appeals said we were. Additional cashier's drafts to the order of Bush, and for his personal benefit, have been proved on this trial, eight in number, from February, 1891, to February, 1893, amounting in all to $594.24. These eight drafts are each for comparatively small sums, running from $170 to $5. If this evidence had been the only additional evidence of Bush's course of business from which implied authority was to be inferred it would have been entirely, in my opinion, inadequate to establish an implied authority to Bush to use the bank's funds for the payment of his own debt. Other additional evidence, new evidence, has been introduced upon this trial, which consists of checks signed by Bush bearing upon their face the statement that they were drawn for drafts to his order

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or for his drafts, which drafts were not also in evidence.

These checks for which no drafts have been found—I am not now speaking of those checks for which drafts have been found and which are included in the eight already mentioned—these checks for which no drafts have been found are nine in number; six made in 1891 and three in 1892, amounting in all to $4,258 34. Three of those drafts, drawn in January, 1891, upon Philadelphia banks for $669.91, for $400 and for $552.55, and one in January, 1892, for $100 upon the Chase National Bank, are said by Bush to be upon the bank's business; so that those three checks and also one for $653.05 upon a Philadelphia bank may be laid out of the case, which leaves those checks amounting in all to $2,375.51. The checks which have been produced amounted to $4,258.34; and deducting those I have just mentioned, amounting to $2,375, leaves in round numbers $2,000. That leaves six checks, one of which is for $769.63. The purpose for which this check for $769.63, of June, 1892, upon the Chase National Bank, was drawn, the draft not having been found, Bush does not remember. It may have been for his private business or for something else. It is not carried in his memory, whatever it was for. Now, the knowledge of this alleged course of business by Bush, no conversation ever having been had on the subject by him with the directors of which any testimony has been given, must have been gained by knowledge which they ought to have gained by an inspection of the books or of the drafts themselves.

If the drafts were not signed by Bush as cashier they do not disclose his exercise of authority. The plaintiff, therefore, says that these drafts, they not being here, might have been signed by Swan, the assistant cashier, and that there is no proof that they were actually signed by Bush. He introduces evidence in regard to the drafts of $653.91, and says that all the checks which were issued to the Chase

National Bank upon the date of the draft, to wit, May 11th, were signed by Swan, and that it is a fair inference that Bush was absent.

Mr. Whitney: I think that is one your Honor charged they ought not to take into consideration.

The Court: That $653.91 draft was withdrawn. So also there are three checks, one for $100 and two for $306.67 each, which were for drafts issued on days when Swan and Bush were each signing drafts.

Now, you must not infer from what I have said that I have divided this testimony into sections and say one does not prove an adequate authority and the second does not prove an adequate authority, and leave to you the question whether the third section of itself proves authority, because the testimony. both that upon the former trial, and the proof introduced on this trial, and the checks produced by Bush evidential more or less of drafts which he says were made to his order for his individual purpose, are all to be taken together and considered by you, and you are to ascertain from them all whether they show a settled course of business during a series of years, or that in numerous business transactions Bush was permitted to draw cashier's drafts to his own order in payment of his private debts, and I am of the opinion that you should require clear proof to satisfy you that the directors had by their acquiescence or by their laches in not ascertaining what they ought to have ascertained, permitted Bush to exercise this authority.

In addition to this testimony of the paper there is also Bush's general testimony. His deposition, you recall, is a very exhaustive one in length in which he says that he made no difference between these drafts to his own order and those drawn to the order of any other purchaser or depositor and that this practice of paying his debts with cashier's drafts to his own order was commenced when he became cashier, or in the very early part of his official connection with the bank.

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This testimony is, of course, to be considered by you, but I do not regard general testimony of this sort to be as significant as the papers which show the exercise of authority. I think the papers are better evidence than general declarations of power by the one who exercises it. Bush's testimony upon all points is to be taken into consideration, but I think that your attention should be carefully directed to the evidence which appears by all papers in the case. Now the papers of Bush, and of the Elmira Bank and the Chase Bank have been so thoroughly investigated by the counsel on both sides that I think you may well believe that all the papers pertaining to Bush's drafts to his own order, that is, all papers of one form or another, either checks or drafts, have been searched out. Of course, the drafts have not been found. I mean that the papers of both kinds have been searched out, and that you have about the whole story. If you find for the defendant upon the $8,000 and the $7,000 items, your verdict will be for the plaintiff for only $12.50 and interest. If you find upon either point, on the $8,000 or on the $7,000 for the plaintiff, of course, that amount, with interest, is to be added to the $12.50.

Mr. Whitney: I think your Honor has charged that the Philadelphia checks should not be taken into consideration.

The Court: That is true.

Mr. Whitney: And that would also apply to this Bank of North America check?

The Court: Yes.

The plaintiff's counsel took severally the following exceptions to the foregoing charge in the presence of the jury.

(1.) To the charge that the importance of the case turns upon another state of facts than the certification of the $15,012.50 check.

(2.) To the charge that the case stands as if when Bush came in, the $8,000 and the $7,000 draft had

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been received by Porter and credited upon the note, and the subsequent form had not been gone into.

(3.) To the charge that if received in good faith and in due course of business, and in payment of a valid debt the defendant is protected, plaintiff claiming that this was not a case of due course of business, but was an irregular transaction.

(4.) To the charge that the plaintiff has the burden of proof on the issue of bad faith.

(5.) To the charge that the testimony of Mr. Porter was entitled to credit on the point of time when the word "Cashier" was written on the face of the draft.

(6.) To the submission to the jury of the question whether Bush's habit ought to have been known to the Board of Directors of the Elmira National Bank.

(7.) To the charge that the case turns upon an implied authority to Bush, there being no proof that the directors knew of his acts.

(8.) To the charge that authority may be implied by acquiescence either from actual knowledge or what should have been the knowledge of the directors.

(9.) To the charge that the jury might take into consideration Bush's testimony as to signing drafts to his own order.

The following rulings were made by the Court and exceptions taken by plaintiff's counsel in the presence of the jury, upon the plaintiff's requests to charge, which had been theretofore duly submitted:

Plaintiff's request 1. "Plaintiff is entitled to a "verdict for the amount of $7,012.50, with interest

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"thereon from May 5, 1893, at the rate of 6 per "cent per annum."

The Court refused to charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 5: "If the jury find that the "transaction of May 5, 1893, as testified to by Mr. "Porter, was not in the ordinary course of business, "then they must find a verdict for the plaintiff in "the full amount claimed, unless, they are also of "the opinion that the circumstances were not such "as would lead a man of ordinary prudence in "Porter's position to make inquiry about the "ownership of the currency."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 9: "If the jury find that Porter "willfully shut his eyes to the fact that this cur- "rency belonged to the Elmira National Bank, de- "fendant must fail as to this defense, and plaintiff "is entitled to a verdict for the full amount "claimed."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 10: "If the jury find that "Porter's ignorance of the true ownership of this "currency was not merely negligent, but willful, "defendant must fail as to this defense, and plain- "tiff is entitled to a verdict for the full amount "claimed."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 11: "If the jury find that Por- "ter's suspicions were aroused as to the true owner- "ship of this currency, then, since he failed to make "any inquiry, defendant must fail as to this de- "fense, and plaintiff is entitled to a verdict for the "full amount claimed."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 12: "The jury are not bound "to believe Porter's testimony upon any point not

"conceded by the plaintiff, even where the testi-
" mony is uncontradicted."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 13: "As bearing upon this de-
" fense the jury are entitled to take into considera-
" tion the large amount of the currency which
" Bush tendered in payment of his individual debt."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 14: "The certification of the
" $15,012.50 check by Bush was a crime under the
" laws of the United States, and this was known,
" or ought to have been known, to both Bush and
" Porter."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 15: "If the jury find that when
" Bush brought in the $7,000 draft it was payable
" to 'J. J. Bush, Cashier,' then it was on its face
" the property of the Elmira National Bank, and if
" they find that under these circumstances the sus-
" picions of an ordinarily prudent man would have
" been aroused as to whether the $8,000 was also the
" property of the bank, then, since Porter failed to
" make any inquiry as to its ownership, the defend-
" ant must fail as to this defense, and the plaintiff
" is entitled to a verdict for the full amount
" claimed."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 23. "The jury are not to take
" into consideration Bush's check of September 30,
" 1891, for $306.67."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 24. "The jury are not to take
" into consideration Bush's check of December 31,
" 1891, for $306.67."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

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Plaintiff's request 26. "The jury are not to take "into consideration Bush's check of June 6, 1892, "for $769.03."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 28. "The jury are not to take "into consideration the draft of March 1, 1893, on "the Hide and Leather National Bank in favor of "M. L. Greider for $600."

The Court refused to so charge, except as charged, and plaintiff's counsel excepted.

Plaintiff's request 29. "The jury are not to take "into consideration the draft of March 31, 1893, on "the Chase National Bank to the order of the "Mutual Life Insurance Company for $500."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 30. "The jury are not to take "into consideration the draft of April 3, 1893, on "the Chase National Bank to the order of Central "Trust Company for $300."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 34. "The burden is upon the "defendant to establish by a preponderance of evi- "dence that there was a well settled course of busi- "ness in the Elmira National Bank authorizing "Bush to draw drafts as cashier to his own indi- "vidual order, without regard to amount, and that "this course of business was actually known to the "directors of said bank; if defendants have failed "to prove this by a preponderance of evidence, the "jury must find a verdict for the plaintiff upon this "issue."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 35. "The jury are not to take "into consideration any one of the prior drafts or "checks which are in evidence, unless they find "that defendant has established by a preponderance "of evidence that the directors of the bank knew

" that a draft was then issued by Bush for his indi-
" vidual benefit, and signed by himself."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

Plaintiff's request 36. " If the jury in the case of
" any one of these prior checks or drafts find that
" the amount is too small to constitute a precedent
" for the subsequent issuance of a $7,000 draft by
" Bush as cashier to his individual order for his in-
" dividual benefit, and then such check or draft
" must be left out of consideration."

The Court refused to so charge except as charged, and plaintiff's counsel excepted.

The jury then retired and subsequently rendered a verdict for the plaintiff for the sum of $12.50, with interest at 6 per cent. from May 5, 1893.

Upon application of the plaintiff this bill of exceptions, having been duly settled according to the provisions of Rule 69 of this Court, is allowed by me and ordered to become a part of the record in this cause at the term aforesaid, and to be filed *nunc pro tunc* as of the 26th day of October, 1900.

N. Shipman
Circuit Judge

Approved
Reed Simpson Thacher & Barnum,
Attorneys for Defendant.
Goodrich Whitney & Hagen,
Attorneys for Plaintiff

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UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,

AGAINST

THE CHASE NATIONAL BANK, Defendant.

Assignment of Errors.

And afterwards, to wit, at the same term at which the above entitled cause was tried and judgment therein rendered, comes the plaintiff aforesaid and says that in the record and proceedings in the above entited cause there is manifest error in each and every one of the following rulings of the Court, to wit:

I.—In permitting the defendant to ask the witness William H. Porter, over objection by plaintiff as incompetent and not binding upon the Elmira National Bank, the following question: "Can you give the substance of what took place between Mr. Bush and yourself at that time [May 5, 1893]"? The witness answered in the affirmative; and the substance of the evidence admitted was that the witness and Bush agreed that the latter should deposit $15,000, not stated to belong to him, in the account of the Elmira Bank with defendant, and draw and certify the check described in the complaint.

II*a*.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial and incompetent, the

following question: "And from that time [*i. e.*, early in 1891 when Mr. C. E. Selover left the bank], who were the controlling persons in that bank?" to which the witness answered, "Col. D. C. Robinson and Mr. Jackson Richardson. The stock that they were holding and purchased represented a majority of it."

b. In denying plaintiff's motion to strike out as immaterial and incompetent the second and last sentence of said answer, beginning with the words "The stock."

III.—In permitting the defendant, over objection by plaintiff as immaterial and incompetent, to read from the deposition of the witness J. J. Bush the following question: "The stock that stood in your name, together with that in Mr. D. C. Robinson's name, was a controlling interest in the stock, was it not?" to which the witness answered, "It was at the last days of the bank, very nearly a controlling interest, I should say."

IV.—In permitting the defendant, over objection by plaintiff that it was immaterial whether or not there were overdrafts in his [Bush's] account, to read from the deposition of the witness, J. J. Bush, the following question: "Now, as matter of fact, did the books of the bank show overdrafts in your account?" to which the witness answered, "I should say that the books of the bank showed my account overdrawn from time to time, as it would any other customer's."

V.—In permitting the defendant to read from the deposition of the witness, J. J. Bush, over objection by plaintiff on the ground that it was immateria whether or not there were overdrafts in his account, the following question: "I am not asking as to whether the account was actually overdrawn, but as to whether it appeared on the face of the books of

the bank that it was overdrawn?" to which the witness answered, "Yes, sir; the same as any other man's account."

VI.—In permitting the defendant to read from the deposition of the witness, J. J. Bush, over objection by plaintiff on the ground that it was immaterial whether or not there were overdrafts in his account, the following question: "And was there any attempt to conceal your overdrafts ever made by you?" to which the witness answered, "No, sir; never."

VII.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff on the grounds hereinafter stated, the following question: "Mr. Bush, you drew other drafts as cashier of the Elmira National Bank to your own order besides the $7,000 Quaker City draft which has been mentioned, did you not?" to which the witness answered, "Yes, sir." The above question was objected to on the following grounds: (1) As immaterial and incompetent as against the Elmira National Bank; (2) that it cannot be any evidence of a course of business, because it does not appear that any of them came to the attention of any of the directors of the bank; (3) that it is no evidence of any course of business, because the directors of that bank could not lawfully have given Bush any general power to issue drafts in his own favor for his individual debts; (4) because no evidence as to prior drafts to Bush's individual order would justify the draft in question, which is admitted to have been payable to Bush as cashier, that is, to the Elmira National Bank, when received by the defendant; (5) that the defendant was put on notice and inquiry as to the true ownership of the $7,000 draft by this endorsement by Bush as cashier, and as it made no inquiry it is not in a position to appeal to any course of business as to drafts to Bush's individual order, were it conceded that such

a course of business existed; (6) that the defendant, by presenting this $7,000 draft for payment to the Philadelphia bank represented to that bank and to the Elmira National Bank that it represented a mere transfer of funds of the Elmira Bank from Philadelphia to New York, and is estopped to assert the contrary; (7) on the ground that the whole transaction testified to by Porter was irregular and outside of any course of business, and that, therefore, cannot be sustained by any proof as to a course of business; (8) that the only evidence by which the defendant could to any extent be relieved from liability to repay the whole amount would be evidence that the $15,000, or some part thereof, was not the property of the Elmira NationalBank, and that is neither pleaded nor proved.

VIII.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial, the following question, "Was any objection ever made to your drawing such drafts [as cashier in his own favor]?" to which the witness answered, "No, sir."

IX.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial, the following question: "Was any objection ever made to your drawing drafts to your own order?" to which the witness answered, "No, sir."

X.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff as immaterial, and not confined to drafts to his own order, the following question: "And from that time on whenever you wanted a draft in your own business you drew it?" to which the witness answered, "Yes, sir."

XI.—In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection

by plaintiff as immaterial, and that not any of these drafts came to the knowledge of the directors of the bank, the following question: "Was any objection ever made by any one to the issuing or using of any of these drafts?" to which the witness answered, "Not that I ever heard of."

XII.—In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $170.83, marked Exhibit 4.

XIII.—In receiving in evidence, over objection by plaintiff that they are immaterial, that they never came to the knowledge of the directors of the bank, that they are far too trivial amounts to form any precedent for a draft of $7,000, the following drafts of the Elmira National Bank on the Chase National Bank, each signed by J. J. Bush, cashier, to the order of J. J. Bush, each being separately objected to and separately assigned for error:

(*a.*) The draft for $129.17, marked Exhibit 5.
(*b.*) " " " $96.67, " " 6.
(*c.*) " " " $35.07. " " 7.
(*d.*) " " " $50, " " 8.
(*e.*) " " " $100, " " 9.
(*f.*) " " " $30, " " 10.

XIV.—In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $5, marked Exhibit 11.

XV.—In denying plaintiff's motion to strike out from the evidence Defendant's Exhibit 9 (being draft of the Elmira National Bank on the Chase National Bank, No. 13,318, dated January 15, 1892, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $100), on the ground that it was used for the purpose of the Elmira National Bank, and not for the witness' personal benefit.

XVI.—In permitting the defendant to ask the witness, J. J. Bush, over objection by plaintiff as immaterial, the following question: "Who were the controlling persons in the management of the Elmira National Bank actually?" to which the witness answered, "Mr. Richardson, Mr. Robinson and myself had more to do with the running of this bank than any of the others."

XVII. –In permitting the defendant to ask the witness, J. J. Bush, over objection by plaintiff as immaterial, and also as too general and asking for conclusions of the witness, the following question: "As a matter of fact was your management of the bank interfered with by any one in any way?" to which the witness answered, "I think that my management of the affairs of the bank was so generally in accord with the management of the bank that no one interfered with me, either in my conduct, or the way I performed my duties in the bank."

XVIII.—(*a.*) In receiving in evidence, over objection by plaintiff, that they were immaterial and not connected with the case, the drafts of the Elmira National Bank drawn on the National Bank of North America, each signed by J. J. Bush, cashier, and drawn to the order of J. J. Bush individually, the dates and amounts of which are as follows: One of October 5, 1893, for $300; another of the same date for $200; and one of December 13, 1892, for $400, marked respectively Exhibits 30, 31 and 32.

(*b.*) In denying plaintiff's motion to strike out said three drafts, on the ground that they were used for the benefit of the bank.

XIX.—In receiving in evidence, over objection by plaintiff that they were immaterial, and on the ground that the draft was not drawn to the order of J. J. Bush, and did not indicate on its face that it was drawn in his private business, a check of J. J. Bush on the Elmira National Bank, dated February 28, 1893, to the order of "Dft. to order M. L. Greider" for $600, and a draft of the Elmira National Bank on the Hide and Leather National Bank, No. 643, dated March 1, 1893, signed by J. J. Bush, cashier, to the order of M. L. Greider for $600, marked respectively Exhibits 36 and 35.

XX.—In receiving in evidence, over objection by plaintiff that they were immaterial, and on the ground that the draft was not drawn to the order of J. J. Bush, and did not indicate on its face that it was drawn in his private business, check of J. J. Bush on the Elmira National Bank, dated March 31, 1893, to the order of "Dft. Mutual Life Insurance Company" for $500, and draft of the Elmira National Bank on the Chase National Bank No. 24,580, dated March 31, 1893, signed by J. J. Bush, cashier, to the order of Mutual Life Insurance Company for $500, marked respectively Exhibits 39 and 38.

XXI.—In receiving in evidence, over objection by plaintiff that they were immaterial, and on the ground that the drafts were not drawn to the order of J. J. Bush, two drafts dated April 3, 1893, of the Elmira National Bank, on the Chase National Bank, one to the order of the Central Trust Company for $300, and another to the order of the Chase National Bank for $77.50, both signed by J. J. Bush as cashier; also a check of the same date on the Elmira National Bank signed by

J. J. Bush to the order of "Dfts. on New York Central Trust Company $300, Chase National Bank $77.50, $377.50," marked respectively Exhibits 48, 47 and 3.

XXII.—In receiving in evidence, over objection by plaintiff that the witness has testified that they were for the benefit of the Elmira National Bank, and that it does not appear that the drafts issued for said checks were signed by Bush, checks on the Elmira National Bank, signed by J. J. Bush; one dated January 3, 1891, to the order of defendant to order J. J. Bush for $669.91, marked Exhibit 50, and another dated April 15, 1891, to the order of defendant to J. J. Bush for $552.55, marked Exhibit 53.

XXIII.—In receiving in evidence, over objection by plaintiff that it does not appear that the drafts issued for said checks were signed by Bush, and on the ground that it does not sufficiently appear that any of the drafts drawn for said checks were to the order of Bush, checks on the Elmira National Bank, signed by J. J. Bush, one dated August 31, 1891, to the order of defendant to J. J. Bush for $100, marked Exhibit 54; another dated September 30, 1891, to the order of defendant to order J. J. Bush for $306.67, marked Exhibit 55; another dated December 31, 1891, to the order of defendant to J. J. Bush for $306.67, marked Exhibit 56; another dated June 6, 1892, to the order of defendant to J. J. Bush for $769.03, marked Exhibit 60.

XXIV.—In receiving in evidence, over objection by plaintiff that the witness has testified that it was for the benefit of the Elmira National Bank, and that it does not appear that the draft issued for said check was signed by Bush, check on the Elmira National Bank signed by J. J. Bush 3/5, 1891, to the order of Philadelphia to J. J. Bush for $400, marked Exhibit 64.

XXV.—In receiving in evidence over objection by plaintiff that the witness has testified that it was for the benefit of the Elmira National Bank, that it does not appear that the draft issued for said check was signed by Bush, that the check is irregular on its face as appears by comparing the dates, and that it affirmatively appears that all the drafts which can be found among the vouchers that were signed by Mr. Swan and none of them by Mr. Bush, check on the Elmira National Bank, signed by J. J. Bush, dated Aug. 9th, 1891, to the order of Dft. on Philadelphia, J. J. B., for $653.05, marked Exhibit 65.

XXVI.—In denying plaintiff's motion to strike out on the ground that it appears that it was entirely hearsay, the answer to the following question: "A year ago you had no knowledge or information of any other moneys belonging to you that were not entered in that account?" Said answer is as follows: "Well, I knew that my account was not as it should be, but as to why I was unable to discover the reason."

XXVII.—In denying plaintiff's motion at the close of the testimony herein for the direction of a verdict for the plaintiff for the full amount claimed.

XXVIII.—In charging the jury as follows (after instructing them as to the illegality of the $15,012.50 check): "The importance of this case turns upon another set of facts to which I will now call your attention."

XXIX.—In charging the jury as follows: "I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft; those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking

Bush's individual check and having it certified by himself as cashier, had not been gone into."

XXX.—In charging the jury as follows with relation to the $8,000 currency: "If it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained."

XXXI.—In charging the jury as follows: "But the plaintiff in attempting to establish bad faith takes the burden of proof."

XXXII.—In charging the jury as follows as to the question whether the word "cashier" was added to the name of the payee on the $7,000 Philadelphia draft when first shown to Porter: "I think undoubtedly the testimony of Mr. Porter is correct on this point."

XXXIII.—In charging the jury as follows as to drafts of dates prior to May 5, 1893, drawn by Bush and submitted to the consideration of the jury: "Providing such acts had been done for a period sufficiently long to establish a settled course of business it may be inferred from the general manner in which they have been done that such acts were known *or ought to have been known* by the directors, and that the cashier had authority"; the error particularly assigned, being the inclusion of the words "or ought to have been known."

XXXIV.—In charging the jury as follows: "The question turns upon an implied authority which is to be inferred from the proved acquiescence of the Elmira Bank in Bush's prior assumption of author ity," there being no proof that the directors knew of such assumption.

XXXV.—In charging the jury as follows as to the failure of his directors to object to Bush's having

signed said prior drafts: "This acquiescence is derived from their actual knowledge or from what should have been their knowledge of the conduct of the course of business of the officers. In this case no actual knowledge has been proved, but the point in the case is the inference to be derived from what the directors should have known by a proper examination of the course of business of their cashier."

XXXVI.—In charging the jury as follows as to Bush's general testimony that he made no difference between drafts to his own order, and those drawn to the order of any other purchaser or depositor: "This testimony is, of course, to be considered by you."

XXXVII.—In refusing to charge as requested by plaintiff as follows: "Plaintiff is entitled to a verdict for the amount of $7,012.50, with interest thereon from May 5, 1893, at the rate of 6 per cent. per annum."

XXXVIII.—In refusing to charge as requested by plaintiff as follows: "If the jury find that the transaction of May 5, 1893, as testified to by Mr. Porter, was not in the ordinary course of business, then they must find a verdict for the plaintiff in the full amount claimed, unless they are also of the opinion that the circumstances were not such as would lead a man of ordinary prudence in Porter's position to make inquiry about the ownership of the currency."

XXXIX.—In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter willfully shut his eyes to the fact that this currency belonged to the Elmira National Bank, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XL.—In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter's ignor-

ance of the true ownership of this currency was not merely negligent, but willful, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XLI.—In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter's suspicions were aroused as to the true ownership of this currency, then, since he failed to make any inquiry, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XLII.—In refusing to charge as requested by plaintiff as follows: "The jury are not bound to believe Porter's testimony upon any point not conceded by the plaintiff, even where the testimony is uncontradicted."

XLIII.—In refusing to charge as requested by plaintiff as follows: "As bearing upon this defense the jury are entitled to take into consideration the large amount of the currency which Bush tendered in payment of his individual debt."

XLIV.—In refusing to charge as requested by plaintiff as follows: "The certification of the $15,012.50 check by Bush was a crime under the laws of the United States, and this was known, or ought to have been known, to both Bush and Porter."

XLV.—In refusing to charge as requested by plaintiff as follows: "If the jury find that when Bush brought in the $7,000 draft it was payable to 'J. J. Bush, Cashier,' then it was on its face the property of the Elmira National Bank, and if they find that under these circumstances the suspicions of an ordinarily prudent man would have been aroused as to whether the $8,000 was also the property of that bank, then, since Porter failed to make

an inquiry as to its ownership, the defendant must fail as to this defense, and the plaintiff is entitled to a verdict for the full amount claimed."

XLVI.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration Bush's check of September 30, 1891, for $306.67."

XLVII.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration Bush's check of December 31, 1891, for $306.67."

XLVIII.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of March 1, 1893, on the Hide and Leather National Bank in favor of M. L. Greider for $600."

XLIX.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of March 31, 1893, on the Chase National Bank to the order of the Mutual Life Insurance Company for $500."

L.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of April 3, 1893, on the Chase National Bank to the order of Central Trust Company for $300."

LI.—In refusing to charge as requested by plaintiff as follows: "The burden is upon the defendant to establish by a preponderance of evidence that there was a well settled course of business in the Elmira National Bank authorizing Bush to draw drafts as cashier to his own individual order, without regard to amount, *and that this course of business was actually known to the directors of said bank;* if defendants have failed to prove this by a

preponderance of evidence, the jury must find a verdict for the plaintiff upon this issue."

LII.—In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration any one of the prior drafts or checks which are in evidence, unless they find that defendant has established by a preponderance of evidence *that the directors of the bank knew* that a draft was then issued by Bush for his individual benefit, and signed by himself."

LIII.—In refusing to charge as requested by plaintiff as follows: "If the jury in the case of any one of these prior checks or drafts find that the amount is too small to constitute a precedent for the subsequent issuance of a $7,000 draft by Bush as cashier to his individual order for his individual benefit, then such check or draft must be left out of consideration.

Wherefore, plaintiff prays that the judgment entered herein be reversed, and a new trial of the above entitled cause granted.

Dated New York, January 31, 1901.

GOODRICH, WHITNEY & HAGEN,
Attorneys for Plaintiff.

(Endorsed)—United States Circuit Court, Southern District of New York.—Charles F. Gale, as Receiver of the Elmira National Bank, Plaintiff, against the Chase National Bank, Defendant.—Assignment of Errors.—Goodrich, Whitney & Hagen, Attorneys for Plaintiff, 59 Wall St., New York. - U. S. Circuit Court.—Filed Feb. 1, 1901.—John A. Shields, Clerk.

13882

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES F. GALE, Receiver Elmira National Bank of Elmira, N. Y.,

AGAINST

CHASE NATIONAL BANK OF NEW YORK.

I direct that a writ of error from the United States Circuit Court of Appeals for the Second Circuit be sued out in this case.

CHARLES G. DAWES,
[SEAL.] Comptroller of the Currency.

OFFICE OF THE
COMPTROLLER OF THE CURRENCY,
WASHINGTON, D. C., January 10, 1901.

(Endorsed)—Circuit Court of the United States, Southern District of New York.—Charles F. Gale, as Receiver of the Elmira National Bank, Plaintiff, against the Chase National Bank, Defendant.—Comptroller's Certificate.—U. S. Circuit Court.—Filed Feb. 1, 1901.—John A. Shields, Clerk.

United States Circuit Court of Appeals for the Second Circuit, October Term, 1900.

Submitted April 24, 1901; decided May 11, 1901.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error, *vs.* THE CHASE NATIONAL BANK, Defendant in Error.	No. 158. Error to the Circuit Court of the United States for the Southern District of New York. Before Judges Wallace and Lacombe.

Per Curiam: The questions presented on this appeal are interesting and some of them have not been passed upon at least in concrete form by the Supreme Court. The record, however, does not seem to present any important modifications (save only as to the number and particulars of former cashier's drafts not objected to) from that which was before this court on the first writ of error (43 C. C. A. 496).

We therefore deem it unnecessary to add anything to the exhaustive discussion of the questions which will be found in the former opinion. Upon that opinion and the careful review of the new proofs which will be found in the judge's charge, the judgment of the circuit court is affirmed.

E. B. Whitney, for the plaintiff in error.
Thomas B. Reed, for the defendant in error.

At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court-rooms in the Post-office building in the city of New York, on the 15th day of May one thousand nine hundred and one.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error,
vs.
THE CHASE NATIONAL BANK, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States, for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said circuit court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

E. H. L.

Endorsed: United States circuit court of appeals, second circuit. Charles F. Gale, as receiver *vs.* Chase National Bank. Order for mandate. United States circuit court of appeals, second circuit. Filed May 15, 1901. William Parkin, clerk.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *May* 17, 1901.

Messrs. Goodrich, Whitney & Hagen, 59 Wall street, New York city.

GENTLEMEN: I direct that a writ of error from the United States Supreme Court be sued out in the case of Charles F. Gale, as receiver of the Elmira national bank *v.* The Chase National Bank.

I direct also, that, in view of the importance of the questions involved in this case, the very long delays in the litigation, and the fact that this case is delaying the final settlement of the affairs of the Elmira national bank, which are otherwise in a position to be wound up, every effort be made to secure an advancement of the case upon the docket of the Supreme Court.

Respectfully,

F. P. KANE,
Deputy & Acting Comptroller.

Endorsed: United States circuit court of appeals, second circuit. Filed May 20, 1901. William Parkin, clerk.

Supreme Court of the United States, October Term, 1900.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff,
against
THE CHASE NATIONAL BANK, Defendant.
} Assignment of Errors.

And now comes Charles F. Gale, as receiver as aforesaid, plaintiff in error, by his counsel and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment in the above-entitled cause in the United States circuit court of appeals for the second circuit, and says that in the record and proceedings therein there is manifest error in overruling each and every one of his assignments of error forming a part of the record in said action before the said circuit court of appeals, to which assignments he begs leave to refer without repetition thereof.

Wherefore, the said Charles F. Gale as receiver as aforesaid respectfully prays that the errors assigned be examined and corrected by this honorable court and that the judgments entered herein by the circuit court and circuit court of appeals be reversed, and a new trial of the above-entitled cause granted.

Dated New York, May 16, 1901.

CHARLES F. GALE,
As Receiver of the Elmira National Bank,
By EDWARD B. WHITNEY,
His Attorney.

Endorsed: Supreme Court of the United States, October term, 1900. Charles F. Gale as receiver of the Elmira national bank plaintiff against The Chase National Bank, defendant. Assignment of errors. Edward B. Whitney, attorney for plaintiff, 59 Wall street, N. Y. city. Due and timely service of a copy of the within assignment of errors is hereby admitted. Dated New York May 18, 1901. Reed, Simpson, Thacher & Barnum, attorneys for defendant in error. United States circuit court of appeals, second circuit. Filed May 20, 1901, William Parkin clerk.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 140, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Charles F. Gale, as receiver of Elmira national bank, against Chase National Bank, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 20th day of May, in the year of our Lord one thousand nine hundred and one, and of the Independence of the said United States the one hundred and twenty-fifth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

{ Ten cent United States internal-revenue stamp, canceled 5, 20, '01. W. P., c'k. }

UNITED STATES OF AMERICA, ss:

To the Chase National Bank, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein Charles F. Gale, as receiver of the Elmira national bank, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 17th day of May, in the year of our Lord one thousand nine hundred and one.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] United States circuit court of appeals, second circuit. Filed May 20 1901. William Parkin, clerk.

Due and timely service of a copy of the within citation is hereby admitted.

New York, May 18, 1901.

REED, SIMPSON, THACHER & BARNUM,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between Charles F. Gale, as receiver of the Elmira national bank, plaintiff in error, and The Chase National Bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of May, in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] United States circuit court of appeals, second circuit. Filed May 20 1900. William Parkin, clerk.

Due and timely service of a copy of the within writ of error is hereby admitted.

New York, May 18, 1901.

REED, SIMPSON, THACHER & BARNUM,
Attorneys for Defendant in Error.

Endorsed on cover: File No. 18,177. U. S. C. C. of appeals 2nd circuit. Term No. 331. Charles F. Gale, as receiver of the Elmira national bank, plaintiff in error, *vs.* The Chase National Bank. Filed May 21st, 1901.